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Mississippi Law Journal

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MEDICAL MALPRACTICE

*Melvin B. Bishop**

I. Introduction

There has recently been an inordinate increase of and interest in actions against physicians and surgeons for personal injuries allegedly sustained as a result of the physician's diagnosis and/or treatment. As a result, practicing members of the bar are being exposed to difficulties associated with such litigation with increasing frequency. The purpose of this article is to outline the skeletal problems facing attorneys involved in the prosecution or defense of such claims.

The term "malpractice" is employed generally to designate "bad practice" sometimes called "malapraxis" in the treatment of a patient by a physician, surgeon, or dentist. Although including simple matters of negligence in the physician's treatment of his patient, malpractice is broader in scope, and a physician's conduct is generally to be tested by different standards. While negligence is often defined as an inadvertence or omission resulting in injury, malpractice also encompasses an ignorant or willful departure from the approved medical practice.[1] The specific grounds for malpractice actions have been said to be as varied as treatments known to medical science and they include: improper diagnosis, error in prescription, infection, surgical removal of healthy organs, negligence of agents or associates, lack of consent, use of harmful drugs or caustic substances, failure to take x-rays, failure to discover contra-indications to treatment, delay, abandonment of case, radium burns, inducing drug addiction, ad infinitum.[2]

II. Standard of Care

Case law, texts, and encyclopedias abound with definitions of the standard of care generally imposed upon physicians in the practice of the healing art. The generally accepted principles which apply to malpractice actions are:

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*Daniel, Coker and Horton, Jackson, Mississippi.

[1]Hayt & Groeschel, Hospital, Physician and Patient 366.

[2]*Medical Malpractice*, 7 Def. L.J. 13.

(1) One licensed to practice medicine is presumed to possess that degree of skill and learning of the average member of his profession in the same locality.

(2) Before a physician or surgeon can be held liable, he must have done something in the treatment of his patient which the recognized standard of good medical practice in the community forbids in such cases, or he must have neglected to do something which standard requires.

(3) To sustain a verdict of malpractice, the standard of local practice must be shown by affirmative evidence. Unless there is evidence the jury may not speculate as to what required standard is, or whether he has departed therefrom.

(4) Negligence is never presumed but must be affirmatively proved and no presumption arises from the mere fact that a treatment has been unsuccessful, failing to bring the best results, or that the patient has died.

(5) Negligence by reason of departure from the proper standard must be established by expert testimony, unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it.

(6) The testimony of other physicians that they would have followed a different course of treatment is not sufficient to establish malpractice unless it also appears that the treatment deviated from one of the standard methods used in the community.[3]

In Mississippi, and in the majority of other jurisdictions, the cases are generally in accord with the standards set forth above. In *Copeland v. Robertson*,[4] our supreme court said:

> It is the universal rule that a physician is liable to his patient for a failure to exercise requisite skill and care. By that it is meant that a physician must possess that reasonable degree of learning, skill, and experience which ordinarily is possessed by others of his profession, and that he must exercise reasonable and ordinary care and diligence in the exertion of his skill and that application of his knowledge, and exert his best judgment as to the treatment of the case intrusted to him—*in short a physician is bound to bestow such reasonable and ordinary care, skill, and diligence as physicians and surgeons in good standing in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases.*[5]

A more concise statement of the standard of care imposed upon physicians in this state was set forth by the Mississippi court in *Rainey v. Horn*:[6]

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[3]HAYT & GROESCHEL, *op. cit. supra* note 1.

[4]236 Miss. 95, 112 So. 2d 236 (1959).

[5]*Id.* at 110, 112 So. 2d at 241.

[6]221 Miss. 269, 72 So. 2d 434 (1954).

> When a physician undertakes to perform the duties of his profession, he impliedly warrants that he possesses and will use the requisite skill and care ordinarily possessed and used by others in his profession. But unsuccessful results of his treatment or action does not give rise to a presumption of negligence.[7]

While the standard of care imposed upon physicians and surgeons in this state is adequately set forth in the above referred to opinions, the standard as defined by other courts is of particular significance since in certain areas they represent a more detailed description of a physician's duty to his patient. One of the earlier and most often quoted decisions relating to the standard of care in malpractice actions is the case of *Pike v. Honsinger*:[8]

> A physician and surgeon, by taking charge of a case impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the standard of practice where the employment is undertaken as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill or the omission to exercise reasonable care, or the failure to use his best judgment. The rule in relation to learning and skill does not require the surgeon to possess extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. Still, he is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been. . . .[9]

Perhaps one of the most stringent burdens which has been placed upon a plaintiff seeking to successfully prosecute a malpractice action is that which was set forth by the Supreme Court of Washington in the case of *Richison v. Nunn*.[10] There the court said:

> A physician or a surgeon . . . must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he

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[7] *Id.* at 276, 72 So. 2d at 436.

[8] 155 N.Y. 201, 49 N.E. 760 (1898).

[9] *Id.* 49 N.E. at 762.

[10] 57 Wash. 2d 1, 340 P.2d 793 (1959).

> must have neglected to do something required by that standard. In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard. Negligence on the part of the physician or surgeon by reason of his departure from the recognized standard of practice must be established by medical testimony.[11]

Remembering that the existence of a legal duty and the breach thereof is the gravamen of any negligence action, it will be appreciated that it is incumbent upon a plaintiff in a malpractice action to establish the proper standard of care allegedly owed and breached by the physician. Conversely, it is incumbent upon the defendant to be prepared to show a conformance to the accepted standard of care.

III. Requisite Proof

In actual practice, the difficulties in establishing a deviation from or a conformance with the prescribed standard of care are more difficult than the abstract legal concepts would imply. The burden is, of course, upon the plaintiff in an action for malpractice to show the want of care, skill, and diligence of a defendant physician or surgeon and also to show that the injury complained of resulted from failure to exercise or possess the requisite degree of skill and learning.[12] The character of evidence sufficient to sustain a malpractice verdict is of great importance. The broad categories of proof, as in other classes of cases, consist of direct and indirect proof, either of which may be sufficient to uphold a jury verdict.

A. Direct Proof

The general rule is that the alleged failure of the defendant physician to adhere to the ordinary standards of the medical community must be established by expert testimony.[13]

In *Sanders v. Smith*,[14] the Mississippi court said that since a physician is not a warrantor of cures, a failure to cure is not evidence of negligence. If it were, few would be courageous enough to practice the healing art. In *Sanders* the court said that whether a physician has used ordinary care is generally a question for experts, and can be established only by their testimony unless the matter in issue is within

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[11] *Id.* 340 P.2d at 795.

[12] *E.g.*, DeLaughter v. Womack, 146 So. 2d 762 (Miss. 1964).

[13] It has been held, however, that in some circumstances, where negligence and harmful results are sufficiently obvious as to lie within common knowledge, a verdict may be supported without expert testimony. Skeels v. Davidson, 18 Wash. 2d 358, 139 P.2d 301 (1943).

[14] 200 Miss. 551, 27 So. 2d 889 (1946).

the common knowledge of laymen. The necessity of expert testimony in Mississippi malpractice actions was reaffirmed by our court in *Copeland v. Robertson.*[15]

A well phrased statement representing what this author believes to be the majority rule regarding the necessity of expert testimony was enunciated by the California court:

> The question as to whether there was proper care in the treatment of a particular case is one to be determined by the opinions of experts. The failure to use such care can be established only by their testimony. 'Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient.'[16]

Similarly, in *Hirsch v. Safian,*[17] which involved an action for a breach of contract to cure, the court's denial of the defendant's motion to strike all evidence concerning a twitch which had developed in the plaintiff's face after the operation by the defendant physician was held to be error in the absence of medical proof as to its causation. The court said that in the absence of proof by men versed in medical skill and science, the jury should not have been permitted to conjecture as to the cause of the injury.

Case law in a majority of the jurisdictions in the United States abound with decisions requiring expert medical testimony to establish a standard of care prevailing in the given community and a showing of a deviation therefrom by medical testimony as to causation.[18]

While it might be assumed from the excerpts of the judicial opinions set forth above that medical testimony by any competent physician that an incorrect diagnosis was in fact made, another course of treatment would have been preferable, or that either of these factors was a proximate cause of the resulting injuries to the plaintiff, would be sufficient to sustain a malpractice verdict, attention should be focused on several other factors affecting the sufficiency of such evidence. First, "the standard of the community" is that standard by which a doctor's diagnosis and/or treatment is to be tested in malpractice actions. In the *DeLaughter* case[19] our court said a physician is required to bestow that degree of reasonable care as physicians in good standing in the "same neighborhood ordinarily have and exercise in like cases."

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[15]Note 4 *supra.*

[16]Simone v. Sabo, 37 Cal. 2d 253, 231 P.2d 19, 22 (1951).

[17]257 App. Div. 212, 12 N.Y.S.2d 568 (1939).

[18]See, *e.g.*, Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949).

[19]Note 12 *supra.*

The Supreme Court of Alabama made this statement relative to the community "standard":

> A physician or surgeon undertakes to exercise at least ordinary diligence and skill in the treatment of his patient—such care and skill as physicians and surgeons *in the same general neighborhood,* pursuing the same general line of practice, ordinarily exercise in like cases.[20] (Emphasis added.)

It will be recalled that the New York court in *Pike v. Honsinger,*[21] referring to the obligation of a treating physician, referred to the "locality where he practices" and to the standard of practice "where the employment is undertaken."

The continual use of the terms "in the same locality" and "in the same community" would indicate that the burden would be upon the plaintiff to produce an expert witness conversant with the standard of practice in the community where the employment or treatment is undertaken so as to testify to the deviation from the required standard.[22]

A second factor must be evaluated in determining the efficacy of expert medical testimony. It seems apparent that not only is a physician's conduct to be tested by the standards of the community in which he practices, but he is entitled to have the treatment of his patient tested by the rules and principles of the school of medicine to which he belongs.[23] In one case it was said:

> In an action for malpractice a physician or surgeon is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs, . . . and if he performs the treatment with ordinary skill and care in accordance with his system, he is not answerable for bad results.[24]

It is important to remember that a physician is not required, as a matter of law, to exercise the highest degree of skill attainable. It is readily understandable that a general practitioner should not be expected to operate with the skill of a surgeon. However, a specialist should be expected to exercise the degree of skill attributable to the specialists in his field, and his performance will be measured against other specialists.[25]

A third consideration in prosecuting or defending an action for

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[20]Carraway v. Graham, 218 Ala. 453, 118 So. 807, 809 (1928).

[21]Note 8 *supra.*

[22]*Compare* Bourgeois v. Dade County, 99 So. 2d 575 (Fla. 1956), *with* 41 AM. JUR. *Physicians and Surgeons* § 87, at 206 (1942), where it is suggested that standards of practice in "similar" communities is the better test.

[23]See Carraway v. Graham, *supra* note 20.

[24]Mann v. Grim-Smith Hosp. & Clinic, 237 Mo. 348, 147 S.W.2d 606, 608 (1941).

[25]See Beach v. Chollett, 31 Ohio App. 8, 166 N.E. 145 (1928).

malpractice is that the law will not allow a defendant physician to be placed at the mercy of testimony of expert competitors whether they agree with him or not.[26] In *Jackson v. Burton*[27] the Supreme Court of Alabama said where there are several recognized methods of treatment, the physician is not liable for malpractice because in the opinion of others a method other than the one used would have been preferable. Accordingly, a physician, although he may be called upon to respond in damages if he fails to follow an accepted method of treatment, may, in relying on his own judgment, adopt one method as opposed to another.

There is a fourth consideration, one which should remain paramount in the minds of a practitioner involving malpractice litigation. A practicing physician is not to be held liable for mere errors in judgment or incorrect diagnosis and treatment where there is room for honest difference of opinion in his diagnosis, treatment, or exercise of judgment. It must have been, however, consistent with one or more recognized theories and not violative of the standard of care and skill ordinarily possessed and exercised by physicians in good standing in the same general line of practice in the community where the employment is undertaken. The Florida court made this significant statement:

> It is not a difficult matter to indicate from a retrospective standpoint the proper course to have pursued in regard to affairs, however complicated they may have been. That is a very safe ground to occupy, and the would-be wise and sagacious usually has sufficient prudence not to venture upon any other. They know thoroughly, and can point out accurately and decidedly, what course should have been pursued, after the occurrence to which it related has transpired.[28]

In summarizing what has been said with respect to the requisite proof, it is apparent that in the majority of cases where direct proof of malpractice is required, medical testimony by physicians in the same general line of practice in the same general community is necessary to establish a breach of that standard of care, that is, a failure of the defendant physician to possess or to exercise that degree of skill and learning ordinarily possessed and exercised by members of the medical profession in good standing in the same community. Failure of a plaintiff to produce a witness that can so testify may well, under the authorities, be fatal to his case. Moreover, it is apparent that hindsight or retrospect does not give sufficient grounds to challenge a diagnosis or a course of treatment by a physician as malpractice. There may be substantial evidence that the defendant physician did, in fact, make an incorrect diagnosis or did pursue an improper course of treatment. Such

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[26]See Sims v. Callahan, 269 Ala. 216, 112 So. 2d 776 (1959).

[27]226 Ala. 483, 147 So. 414 (1933).

[28]Crovella v. Cochrane, 102 So. 2d 307, 311-12 (Fla. 1958).

fact, however, standing alone, would afford a plaintiff no basis for relief, for the reason that the test of a plaintiff's cause of action in malpractice is negligence; and the burden rests upon him not only to prove that the defendant physician made a mistake in diagnosis or pursued an improper course of treatment and that such mistake was a negligent one, but that the defendant did not use reasonable care and diligence in the exercise of his professional skill or in the application of his learning.

B. Inferences and Circumstantial Evidence

There is a wide contrariety of judicial opinion throughout the United States as to the propriety of the application of the doctrine of res ipsa loquitur to raise an inference of negligence sufficient to carry a plaintiff's case to the jury. In Mississippi the doctrine has been applied in some circumstances and rejected in others. It was applied in an action involving the unexplained leaving of a rubber tube in the body of the plaintiff[29] and in a case where bugs and infectious materials were permitted to enter the plaintiff's body during surgery,[30] the theory apparently being that the plaintiff's body at that time was under the exclusive control of the defendant.[31] Our court in *Waddle v. Sutherland*[32] again applied the doctrine when the plaintiff received x-ray burns while undergoing treatment at the hands of the defendant physician. The doctrine has, however, been rejected by our supreme court. In a case where the plaintiff's decedent succumbed during a tonsillectomy, the court pointed out that it could not be said that death does not occur during a tonsillectomy without negligence, an essential ingredient to the application of the doctrine.[33] And in a case involving an action for personal injuries resulting from deleterious effects of a penicillin injection the doctrine was recently rejected.[34]

The application of res ipsa loquitur in malpractice cases is predicated upon the existence of the familiar common law requisite. In *Sanders v. Smith,* our court said:

> The real question, generally, is whether or not in the process of the operation any extraordinary incident or unusual event, outside of the routine of the action of its performance, occurred, and beyond the regular scope of its customary professional activity in such operations, which, if unexplained, would themselves reasonably speak to the average man as the negligent

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[29]See Saucier v. Ross, 112 Miss. 306, 73 So. 49 (1916).

[30]See Prewett v. Philpat, 142 Miss. 704, 107 So. 880 (1926).

[31]*Ibid.*

[32]156 Miss. 540, 126 So. 201 (1930).

[33]Sanders v. Smith, 200 Miss. 551, 27 So. 2d 889 (1946).

[34]DeLaughter v. Womack, *supra* note 12.

> cause or causes of the untoward consequence. If there were such extraneous interventions, then the doctrine of res ipsa loquitur would be applicable to call upon the defendant to explain the matter, by evidence of exculpation, if he could.[35]

In a concurring opinion in this case Judge Alexander made a statement which would seem to have particular significance in cases where the doctrine is sought to be applied:

> I find it not inappropriate to emphasize that although death is an unusual result of a tonsillectomy, negligence is not supplied under the doctrine of "res ipsa loquitur," because there was no showing as to the cause of the death. This doctrine never supplies the proximate cause; it is set in operation by a showing thereof. Here negligence, if it existed, could have arisen in the surgical procedures, a failure to test the patient for susceptibility to untoward reactions, an improper administration of anesthetics or careless post-operative care. Of course, it could also have been due to unforeseen but normal causes . . . . Death alone is insufficient to establish both its cause and an inference of negligence therefrom.[36]

A review of those cases in which the doctrine has been applied in malpractice actions reveals that the facts have involved the permitting of gauze tubing,[37] surgical instruments,[38] needles,[39] or bugs and infectious materials,[40] to be left in the patient's body, and the burning of the patient with hot water bottles,[41] x-ray,[42] and anesthetics,[43] and others where such unusual and extraordinary occurrences bespeak negligence to the average layman.

Some jurisdictions, however, notably California, began the application of the doctrine of res ipsa loquitur to malpractice actions on the theory that the plaintiff's body was under the exclusive control of the defendant physician and that the defendant physician was in a superior position to explain the cause of the bad results. In *Ybarra v. Spangard*,[44] which involved a shoulder injury, resulting, apparently, from an injection administered in the plaintiff's shoulder in preparation for an appendec-

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[35]Sanders v. Smith, 200 Miss. 551, 561, 27 So. 2d 889, 893 (1946).

[36]*Id.* at 562, 27 So. 2d at 893 (concurring opinion).

[37]Saucier v. Ross, *supra* note 29.

[38]Leonard v. Watsonville Community Hosp., 47 Cal. 2d 509, 305 P.2d 36 (1956).

[39]General Benevolent Ass'n, Inc. v. Fowler, 210 Miss. 578, 50 So. 2d 137 (1951).

[40]Prewett v. Philpat, *supra* note 30.

[41]Frost v. Des Moines Still College of Osteo. & Surg., 248 Iowa 294, 79 N.W.2d 306 (1956).

[42]Waddle v. Sutherland, 156 Miss. 540, 126 So. 201 (1930).

[43]Terhune v. Margaret Hague Maternity Hosp., 63 N.J. Super. 106, 164 A.2d 75 (Super. Ct. App. Div. 1960).

[44]25 Cal. 2d 486, 154 P.2d 687 (1944).

tomy. After surgery, pain and discomfort developed in the shoulder area and after discharge from the hospital, paralysis and atrophy of the muscles around the shoulder developed. Hence the unusual, extraordinary event outside of the normal course of an appendectomy occurred, injury to the plaintiff's arm. This, as our court noted in *Sanders v. Smith*,[45] appeared to be the basis for the application of the doctrine, not the mere fact of an untoward result from the injection. The decision in *Ybarra*, however, set the stage for an almost unbridled application of the doctrine in that state. In *Bauer v. Otis*, the California court of appeals declared that "it is a matter of common knowledge among laymen that injections in the muscles of the arm, as well as other portions of the body, do not cause trouble unless unskillfully done or there is something wrong with the serum."[46] This holding has been followed by the California Supreme Court.[47]

Criticizing the extension of the res ipsa loquitur doctrine in California, one writer had this to say:

> During the past several years, the California courts have expanded the doctrine far beyond any point of logical application. The application of the doctrine to medical accidents, solely because the injury in question is presumed to be rare, is an "extension of the scope of *res ipsa loquitur* which has resulted in grave injustice to California doctors and which inevitably will interfere with the practice of good medicine."
>
> By regarding rare injuries as circumstantial evidence of negligence, California courts have neglected the fact that there is an inevitable risk in any medical procedure that must be calculated against the benefit to be gained . . . .
>
> To say that a rare accident does not ordinarily happen is a truism. But to say that it ordinarily does not happen absent negligence is a statement that cannot be made without the support of an expert witness. If there is medical proof of an inevitable occurrence of an untoward event, then there is no logical basis for the application of *res ipsa loquitur* . . . .[48]

The cases applying res ipsa loquitur to malpractice actions suggest that a plaintiff insisting on an application of the doctrine to a given set of circumstances or a defendant objecting to an instruction on the doctrine must bear in mind that the salutary rule of res ipsa loquitur is a rule of necessity to be invoked only when necessary evidence is absent and not readily available.[49] When all the facts and circumstances

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[45]Note 33 *supra*.

[46]Bauer v. Otis, 133 Cal. App. 2d 439, 284 P.2d 133, 136 (Dist. Ct. App. 1955).

[47]Wolfsmith v. Marsh, 51 Cal. 2d 832, 337 P.2d 70 (1959).

[48]Rubsamen, *Siverson v. Weber—A Reconsideration of Res Ipsa Loquitur in Medical Malpractice*, 15 STAN. L. REV. 77, 78 (1962).

[49]See 3 COOLEY, TORTS § 480 (4th ed. 1932), quoted in Johnson v. United States, 333 U.S. 46, 53 (1948) (Frankfurter, J., dissenting).

appear in evidence and nothing is then left to inference, the necessity for the doctrine does not exist. Being a rule of necessity, it should be invoked only where evidence is absent and not readily available.

It would appear, in all events, before the doctrine would be applicable to a malpractice action that the same considerations and predicates should exist that are required in other negligence actions. These predicates are: (1) the accident must be of the kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agent or instrumentality within the exclusive control of the defendant physician; (3) it must not have been due to any voluntary action on the part of the plaintiff; and (4) the plaintiff must not be in a position to show the particular circumstances which caused the offending instrumentality to operate to his injury.[50]

It would seem highly dangerous and susceptible of being construed as reversible error if the doctrine is applied in malpractice actions where there are two or more opposing theories as to the cause of the plaintiff's injuries. For example, a plaintiff's expert witness testifies that, in his opinion, improper treatment led directly to the plaintiff's injuries, and an expert witness for the defendant testifies as to a non-negligent cause which, in his opinion, operated to cause the plaintiff's injuries. The application of the doctrine of res ipsa loquitur would be used as a geiger counter to select the plaintiff's explanation or allegation as being preferable or superior to that offered by the defendant. This would appear to be an invasion of the jury's province as giving more weight to one theory than to another.

The case of *DeLaughter v. Womack*[51] involved gangrene of the minor plaintiff's left foot and toes subsequent to an injection of penicillin and oil. It was the plaintiff's theory of action that there had been an intra-arterial injection of penicillin and oil into the gluteal artery which caused an embolus in the plaintiff's toes and foot leading to necrosis and gangrene. It was the defendant's theory of the action that the plaintiff's malady resulted from a vascular reaction set up by a penicillin allergy. This process of vascular reaction was referred to by medical testimony as necrotizing angitis. The plaintiff solicited and, over objection of counsel for the defense, secured an instruction on the doctrine of res ipsa loquitur. After a jury verdict, the plaintiff appealed on the ground of error in the court's instructions. In the course of its opinion, reversing the jury verdict for the defendant, the court categorically rejected the application of the doctrine of res ipsa loquitur to such circumstances. The court did, however, say, in response to the defendant's contention that they were entitled to a peremptory instruction, that the fact of the

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[50]38 Am. Jur. *Negligence* § 295, at 989 (Supp. 1964).

[51]Note 12 *supra.*

injury and all the attendant circumstances constituted circumstantial evidence which might properly give rise to an inference of negligence sufficient to establish a prima facie case for a jury determination. The court's holding in this respect was predicated upon the common law rule that negligence and proximate cause may be established by circumstantial evidence. In support of its holding, the court pointed out that in actions where there is direct as well as circumstantial evidence, it is not necessary that the plaintiff exclude all other possible causes but that a mere probability is sufficient.

Although it seems paradoxical that the doctrine of res ipsa loquitur would be rejected in *DeLaughter*, and inferences from circumstantial evidence held sufficient to take a case to the jury, it is unquestionably the rule in malpractice cases in this state that malpractice can be sufficiently established to make out a jury issue by the use of circumstantial evidence. Practitioners in prosecuting claims for malpractice might take such approach cautiously, however, lest in so doing their particular facts and circumstances are not such that a probability is established. As heretofore pointed out, physicians are not guarantors or warrantors of their cures. To assume that the fact of an untoward result, in and of itself, even though there may be other attending circumstances which might suggest negligence, is sufficient to gain a jury verdict might well, on appeal, give rise to an expression similar to that of the Georgia court which said:

> Where it cannot reasonably be determined from the plaintiff's evidence whether or not the defendant's negligence caused the injury complained of, a nonsuit is proper. . . . When the party upon whom the burden of an issue rests seeks to carry it, not by direct proof, but by inferences, he has not, in this reasonable sense, submitted any evidence for a jury's decision until the circumstances he places in proof tend in some proximate degree to establish the conclusion he claims; and for this the facts shown must not only reasonably support the conclusion, but also render less probable all inconsistent conclusions.[52]

It is clear from what has been said with reference to indirect proof that its use involves latent pitfalls both to the prosecution and defense. Utilization of such proof should be made only where direct proof is not available, and under such circumstances the defense should be prepared to explain or rebut inferences which call for explanation.

IV. Instructions

Whether direct or indirect proof or a combination of both is to be relied upon by a plaintiff, particular care should attend the offering of evidence and the preparation of instructions. The evidence and the instructions of law with respect thereto should conform with the issues

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[52]Camp v. Emory Univ., 95 Ga. App. 442, 98 S.E.2d 66, 68 (1957).

drawn by the pleadings. In *Newport v. Hyde,* the supreme court said: "Malpractice liability may result *either* through lack of skill or neglect to apply it, if possessed. The two are separate, distinct bases of liability."[53] (Emphasis added.)

A defendant's verdict in that case was reversed because one of the defendant's instructions required the plaintiff to have proven not only a lack of skill but a failure to apply it although the plaintiff had charged only failure to exercise the requisite skill.

The court in *DeLaughter,*[54] found a similar instruction using the terms "possess and exercise" erroneous on the basis of the *Hyde* case. This conclusion was reached in *DeLaughter,* although the plaintiff had charged negligence in administering the penicillin injection, negligence in treating the resulting condition, negligence in failing to consult a specialist, and negligence by inference arising from the application of res ipsa loquitur. Inasmuch as the inference arising from res ipsa loquitur would seem to go also to an inference of the lack of necessary skill, the reasoning of the court in *DeLaughter* would seem specious in this regard. Especially is this true in light of the allegations that specialists should have been earlier consulted and that the defendant nurse failed to possess skill necessary for the proper administration of penicillin. Proper analysis would suggest that the words of art, "possess and exercise" should apply to the physician's skill and "reasonable and ordinary care" to the issue of negligence vel non in exercising that skill in the treatment of the patient. Nevertheless, under *Hyde* and *DeLaughter* the use of the terms "possess and exercise" or any derivative of this conjunctive phrase would be suspect unless the dual failure was alleged or proof offered as to lack of skill and failure also to exercise ordinary care.

It is therefore apparent that the problems of pleading and adducing evidence and the preparation of instructions in conformance therewith involves technicalities unique to the field of malpractice, and the attorneys, of necessity, must exercise caution in each endeavor.

V. Conclusion

The myriad of problems involved in malpractice litigation obviously cannot be comprehensibly treated in an article such as this. Intensive research will be required in conjunction with the particular circumstances surrounding each claim of malpractice. It is hoped, however, that the foregoing treatment of the standard of care imposed upon physicians and the discussion of the proof required will be of some value to those attorneys who may in the future find themselves for the first time in the wilderness of malpractice litigation.

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[53]Newport v. Hyde, 244 Miss. 870, 875, 147 So. 2d 113, 115 (1962).

[54]Note 12 *supra.*

THE PROPER ROLE OF THE FEDERAL COURTS IN THE REAPPORTIONMENT OF STATE LEGISLATURES

*Lawrence R. Caruso**

I

Properly, the federal courts should have no role in the discretionary aspects of the reapportionment of state legislatures. This position is taken despite the holdings by the United States Supreme Court in *Baker v. Carr*[1] and *Reynolds v. Sims*.[2] Since it is the thesis of this article that the federal courts have no proper role in the discretionary aspects of the reapportionment of state legislatures then, of necessity, it also must be the position of this article that the holdings of the Supreme Court in *Baker v. Carr* and *Reynolds v. Sims* are not a correct statement of law.

The American system of government frequently has been described as a system of checks and balances. These checks and balances operate in various ways and between the various elements of government. Not only do the checks and balances operate, in the area of separation of powers, between the legislative branch, the executive branch, and the judicial branch, within the national government, and between the equivalent branches within the state governments, but they can and sometimes do operate, in what has been called dual federalism, between one of the branches of the national government and one of the branches of a state government. One such form which these checks and balances had not taken until the recent past is a role played by the federal courts in deciding discretionary questions relating to the reapportionment of state legislatures. With the decisions of the United States Supreme Court in *Baker v. Carr* and *Reynolds v. Sims* that state of affairs probably has come to an end at least temporarily and possibly permanently.

In *Baker v. Carr* the plaintiffs (appellants) had contended that they and other voters of the State of Tennessee, similarly situated, were denied the equal protection of the laws accorded them by the fourteenth amendment to the Constitution of the United States by virtue of the debasement of their votes, because from 1901 to 1961 the Legislature of Tennessee had failed to reapportion itself, although in those years Tennessee had experienced substantial growth and redistribution of its pop-

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[1]369 U.S. 186 (1962).

[2]377 U.S. 533 (1964).

ulation. The plaintiffs brought an action in the United States District Court for the Eastern District of Tennessee and sought a declaration that the 1901 Tennessee Apportionment Act was unconstitutional. They sought an injunction restraining the appellees from acting to conduct any further elections under it. The plaintiffs also contended that unless and until the General Assembly of Tennessee enacted a valid reapportionment the court should either decree a reapportionment by mathematical application of the formula contained in the Tennessee Constitution to the most recent census figures, or direct the appellees to conduct legislative elections, primary and general, at large. The United States District Court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted.[3] Upon appeal the United States Supreme Court held that the dismissal by the district court was error, and remanded the cause to the district court for trial and further proceedings.[4]

Because of the posture of the case as it came to the Supreme Court from the district court, the Supreme Court did only three things. First, it held that the district court possessed jurisdiction of the subject matter. Secondly, it held that a justiciable cause of action was stated upon which the appellants would be entitled to appropriate relief. And, thirdly, because the appellees had raised the issue before the Supreme Court, that Court held that the appellants have standing in the district court to challenge the Tennessee apportionment statutes. The Supreme Court did state that it was improper at that time for it to consider what remedy would be most appropriate if the appellants were to prevail at the trial. But the Court noted that there was no cause to doubt that the district court would be able to fashion relief if violations of constitutional rights were found at the trial.[5]

The Supreme Court concluded that the cause presented no nonjusticiable "political question." This conclusion settled the only possible doubt in the Court's view that the matter before it was a case or controversy. Thus, the matter set forth in the complaint did arise under the United States Constitution and was within the appropriate section of the federal statutes conferring jurisdiction upon the United States District Courts.[6]

The appellees relied heavily upon *Colegrove v. Green*[7] as authority that the district court lacked jurisdiction of the subject matter. The Supreme Court did not, as frequently is supposed, overrule *Colegrove v.*

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[3]Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959).

[4]Baker v. Carr, 369 U.S. 186, 188 (1962).

[5]*Id.* at 197-98.

[6]*Id.* at 198-99.

[7]328 U.S. 549 (1946).

Green in deciding *Baker v. Carr.* In no uncertain terms Mr. Justice Brennan, speaking for the Court, stated that the appellees had misconceived the holding of *Colegrove v. Green* and that the holding in that case was precisely contrary to the appellees' reading of it.[8] The Supreme Court also found that the United States District Court for the Middle District of Tennessee had misinterpreted *Colegrove v. Green* and other decisions of the Supreme Court on which it had relied.[9]

Early in 1964 the Supreme Court of the United States decided *Wesberry v. Sanders.*[10] Although *Wesberry* involved congressional districting, it had a considerable effect on the apportionment of state legislatures, because it became one of the building blocks, some four months later, for *Reynolds v. Sims.*[11]

Mr. Wesberry and the other plaintiffs were citizens and qualified voters of Fulton County, Georgia, and as such were entitled to vote in congressional elections in Georgia's Fifth Congressional District. That district, one of ten created by a 1931 Georgia statute, included Fulton, DeKalb, and Rockdale Counties, and had a population according to the 1960 census of 823,680. The average population of the ten districts was 394,312, less than half that of the Fifth. One district, the Ninth, had only 272,154 people, less than one-third as many as the Fifth. Since there was one Congressman for each district this inequality of population was said to mean that the Fifth District's Congressman had to represent from two to three times as many people as did Congressmen from some of the other Georgia districts.

Claiming that these population disparities deprived them and voters similarly situated of a right under the federal constitution to have their votes for Congressmen given the same weight as the votes of other Georgians, the plaintiffs brought an action in the United States District Court for the Northern District of Georgia, Atlanta Division, asking that the Georgia statute be declared invalid, and that the defendants, S. Ernest Vandiver, the Governor of the State of Georgia, and Ben W. Fortson, Jr., the Secretary of State of the State of Georgia, be enjoined from conducting elections under it.[12] The complaint alleged that the plaintiffs were deprived of the full benefit of their right to vote, in violation of: (1) article I, section 2 of the Constitution of the United States, which provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . ."; (2) the due process, equal pro-

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[8]Baker v. Carr, 369 U.S. 186, 202 (1962).

[9]*Id.* at 209.

[10]376 U.S. 1 (1964).

[11]377 U.S. 533 (1964).

[12]Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962).

tection, and privileges and immunities clauses of the fourteenth amendment; and (3) that part of section 2 of the fourteenth amendment which provides that "Representatives shall be apportioned among the several States according to their respective numbers. . . ."

The United States Supreme Court was of the view that in debasing the weight of appellants' votes the State had abridged the right to vote for members of Congress guaranteed them by the United States Constitution, that the district court should have entered a declaratory judgment to that effect, and that it was therefore error to dismiss the suit. The question of what relief should be given the Supreme Court left for further consideration and decision by the district court in light of existing circumstances.[13]

In the opinion of the Supreme Court the reasons which in *Baker v. Carr* had led to the conclusions (1) that the district court had jurisdiction of the subject matter; (2) that the qualified Tennessee voters there had standing to sue; and (3) that the plaintiffs had started a justiciable cause of action on which relief could be granted, were equally persuasive in *Wesberry v. Sanders*.[14] The majority believed that the right to vote is too important in our free society to be stripped of judicial protection by an interpretation of article I of the Constitution which would hold that article I, section 4 had given Congress "exclusive authority" to protect the right of citizens to vote for Congressman.[15] With this *ipse dixit* statement the Court struck a blow at both federalism and the separation of powers.

The Court said that if the federal constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then the 1931 Georgia congressional districting statute cannot stand.[16]

The Supreme Court held that, construed in its historical context, the command of article I, section 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. Thus, the Court did not reach the arguments that the Georgia statute violated the due process, equal protection, and privileges and immunities clauses of the fourteenth amendment.[17] The Court said that the history of the Constitution, particularly that part of it relating to the adoption of article I, section 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election,

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[13]Wesberry v. Sanders, 376 U.S. 1, 4 (1964).

[14]*Id.* at 5-6.

[15]*Id.* at 6-7.

[16]*Id.* at 7.

[17]*Id.* at 7-8.

whether statewide or by districts, it was population which was to be the basis of the House of Representatives.[18]

After *Wesberry* there would seem to be nothing left that the Supreme Court could do respecting congressional districting. There was, however, one more step which could be taken respecting state legislative apportionment.

Baker v. Carr had not held that *both* houses of a bicameral legislature must be apportioned on the basis of population. On June 15, 1964, in six related decisions, the Supreme Court of the United States took this final step to abolish the federalism which had existed from the adoption of the United States Constitution. While these decisions may have shocked, one hardly can plead surprise, since after *Baker* and *Wesberry* one might easily have predicted the result in these six decisions. The six decisions disposed of eight cases. Three cases arising in Alabama were disposed of in *Reynolds v. Sims*.[19] Cases arising in New York, Colorado, Maryland, Virginia, and Delaware were disposed of, respectively, by *WMCA, Inc. v. Lomenzo*,[20] *Lucas v. Forty-Fourth Gen. Assembly*,[21] *Maryland Committee for Fair Representation v. Tawes*,[22] *Davis v. Mann*,[23] and *Roman v. Sincock*.[24] Mr. Chief Justice Warren delivered the opinion of the Court in all six decisions.

Reynolds v. Sims disposed of three cases involving an appeal and two cross-appeals. They came to the United States Supreme Court on appeal from the United States District Court for the Middle District of Alabama, where they had been heard as *Sims v. Frink*. In deciding the cases the Supreme Court relied on cases which do not appear to be relevant to the issues in *Reynolds v. Sims*.[25] The Court devoted considerable attention not only to *Baker v. Carr*, which involved apportionment of a state legislature, but also to *Gray v. Sanders* and *Wesberry v. Sanders*, which did not.[26] The Court conceded, however, that *Gray* and *Wesberry* are of course not dispositive of or directly controlling on its decision in the *Reynolds* cases involving state legislative apportionment controversies.[27] Nevertheless, the Court seems to have relied on *Gray* and *Wesberry* in reaching its conclusions.

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[18] *Id.* at 8-9.

[19] 377 U.S. 533 (1964).

[20] 377 U.S. 633 (1964).

[21] 377 U.S. 713 (1964).

[22] 377 U.S. 656 (1964).

[23] 377 U.S. 678 (1964).

[24] 377 U.S. 695 (1964).

[25] 377 U.S. 533, 554-55 (1964).

[26] *Id.* at 557-60.

[27] *Id.* at 560-61.

The Court held that, as a basic constitutional standard, the equal protection clause of the fourteenth amendment requires that the seats in *both* houses of a bicameral state legislature must be apportioned on a population basis.[28] The Court said that, simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state.

The Supreme Court concluded that the plan for apportioning seats in the Alabama Legislature, in issue, could not be sustained by recourse to the federal analogy (to the United States Senate). Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean, said the Court, that such a plan is irrational or involves something other than a "republican form of government." The Court concluded simply that such a plan is impermissible for the states under the equal protection clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.[29]

WMCA, Inc. v. Lomenzo came to the United States Supreme Court on appeal from the United States District Court for the Southern District of New York.[30] At issue was the constitutional validity, under the fourteenth amendment to the United States Constitution, of the apportionment of seats in the New York Legislature.[31] The result of applying the complicated New York apportionment formula is to give the populous counties markedly less senatorial representation, when compared with respective population figures, than the less populous counties.[32] The same is true of representation in the assembly.

The Supreme Court cited *Reynolds v. Sims* for the holding that the equal protection clause requires that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis. Neither house of the New York Legislature, under the state constitutional formulas and the implementing statutory provisions attacked by the plaintiff-appellants in *WMCA,* was then or, when apportioned on the basis of 1960 census figures, would be apportioned sufficiently on a population basis to be constitutionally sustainable. Accordingly, the Supreme Court held that the district court erred in upholding the constitutionality of New York's scheme of legislative apportionment. However complicated or sophisticated an apportionment scheme might be, it

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[28]*Id.* at 568.

[29]*Id.* at 575.

[30]WMCA, Inc. v. Simon, 196 F. Supp. 758 (S.D. N.Y. 1961); 202 F. Supp. 741 (S.D. N.Y. 1962); 208 F. Supp. 368 (S.D. N.Y. 1962).

[31]WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

[32]*Id.* at 644.

cannot, the Court said, consistent with the equal protection clause, result in a significant undervaluation of the weight of the votes of certain of a state's citizens merely because of where they happen to reside.[33]

Lucas v. Forty-Fourth Gen. Assembly came to the United States Supreme Court on appeal from the United States District Court for the District of Colorado.[34] The district court had upheld the validity, under the equal protection clause of the fourteenth amendment to the United States Constitution, of the apportionment of seats in the Colorado Legislature pursuant to the provisions of a constitutional amendment approved by the Colorado electorate in 1962.[35]

Once again, the Supreme Court cited *Reynolds v. Sims* for the holding that the equal protection clause requires that both houses of a bicameral state legislature must be apportioned substantially on a population basis.[36] Although apparently the Supreme Court found the apportionment of the Colorado House of Representatives pursuant to the state constitutional amendment to be satisfactory, the Court concluded that the district court had erred in holding the legislative apportionment plan to be constitutionally valid, because the overall legislative representation in the *two* houses of the Colorado Legislature was not sufficiently grounded on population to be constitutionally sustainable under the equal protection clause.[37] Thus, the Colorado House of Representatives fell with the Colorado Senate.

On remand, the district court was required to determine whether the imminence of the 1964 primary and general elections required that utilization of the apportionment scheme contained in the state constitutional amendment be permitted, for purposes of those elections, or whether the circumstances in Colorado were such that appellants' right to cast adequately weighted votes for members of the state legislature could practicably be effectuated in 1964. Accordingly, the Supreme Court reversed the decision of the district court and remanded the case for further proceedings consistent with the views stated in *Lucas* and in *Reynolds*.[38]

On July 8, 1964, Colorado became the first state to reapportion both houses of its legislature essentially on a population basis.[39] It was reported that, in a six-day special session, the Colorado Legislature

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[33]*Id.* at 653.

[34]377 U.S. 713 (1964).

[35]Lisco v. McNichols, 208 F. Supp. 471 (D. Colo. 1962); Lisco v. Love, 219 F. Supp. 922 (D. Colo. 1963).

[36]Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 734 (1964).

[37]*Id.* at 734-35.

[38]*Id.* at 739.

[39]Washington (D.C.) Post, July 9, 1964, p. A12, col. 8.

reapportioned both houses and redistricted its congressional seats in a fashion which met the approval of a three-judge district court, and which was signed into law by Governor John Love.

Maryland Comm. for Fair Representation v. Tawes came to the United States Supreme Court on appeal from the Court of Appeals of Maryland.[40] The case involved an appeal from a decision of the Maryland Court of Appeals upholding the validity, under the equal protection clause of the fourteenth amendment to the United States Constitution, of the apportionment of seats in the Maryland Senate.[41]

The Supreme Court found that neither house of the Maryland Legislature, even after the 1962 legislation reapportioning the house of delegates, was apportioned sufficiently on a population basis to be constitutionally sustainable. Thus, citing *Reynolds*, the Court concluded that the Maryland Court of Appeals erred in holding the Maryland legislative apportionment valid, and that the decision below must be reversed.[42]

The Court said, "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."[43] Where else, one might ask, did this jurisdiction reside in the one hundred seventy-five years from 1787 to 1962?

Then, in a footnote, the Supreme Court entirely gratuitously drew an invidious comparison to the Court of Appeals of Maryland, when it said, "A commendable example of an exercise of judicial responsibility by a state court in a case involving state legislative apportionment is provided by the action of the Kansas Supreme Court in *Harris v. Shanahan*, 387 P.2d 771 (Kan. Sup. Ct. 1963)."[44] One is not surprised to learn that in that case the Kansas Supreme Court held that the statutory provisions apportioning seats in both houses of the Kansas Legislature were constitutionally invalid. Presumably, what the Supreme Court expected of the Court of Appeals of Maryland is that, in deciding *Tawes* on September 25, 1962, it should have anticipated the holding of the Supreme Court in *Reynolds* on June 15, 1964, and should have ruled accordingly. It is perhaps symptomatic of the swift pace of present-day changes in constitutional adjudication that the Supreme Court should expect a state court to keep ahead of the Supreme Court. There is something to be said for the Supreme Court's position, however, for the pace is such

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[40]377 U.S. 656 (1964).

[41]Maryland Comm. for Fair Representation v. Tawes, 288 Md. 412, 180 A.2d 656 (1962); 229 Md. 406, 184 A.2d 715 (1962).

[42]377 U.S. 656, 674-76 (1964).

[43]*Id.* at 674.

[44]*Id.* n.18.

that he who is not ahead of the Court assuredly is behind it.

Davis v. Mann came to the United States Supreme Court on appeal from the United States District Court for the Eastern District of Virginia.[45] Presented for decision was the validity, under the equal protection clause of the fourteenth amendment to the United States Constitution, of the apportionment of seats in the legislature of the Commonwealth of Virginia.

The Supreme Court found that neither of the houses of the Virginia General Assembly, under the 1962 statutory provisions attacked in *Davis,* was apportioned sufficiently on a population basis to be constitutionally sustainable. Accordingly, citing *Reynolds,* the Court held that the district court properly found the Virginia legislative apportionment invalid.[46]

Last of the six apportionment decisions rendered on June 15, 1964, was *Roman v. Sincock.*[47] The case came to the Supreme Court on appeal from the United States District Court for the District of Delaware. Presented for decision was the constitutional validity, under the equal protection clause of the fourteenth amendment to the United States Constitution, of the apportionment of seats in the Delaware General Assembly.

The Supreme Court found that neither the senate nor the house of representatives of the Delaware General Assembly, either before or after a 1963 state constitutional amendment, was apportioned substantially on a population basis. Thus, citing *Reynolds v. Sims,* the Supreme Court held that the district court correctly found the Delaware legislative apportionment constitutionally invalid, and affirmed the decisions below.[48]

II

A large number of the commentaries on reapportionment deal in irrelevancies and neglect the real issues. From the point of view of the constitutional role of the federal courts, what does it really matter whether malapportionment exists, or if it exists whether it is bad? The real issues are: What is the proper role of the United States Supreme Court, and do the federal courts have any proper role in the reapportionment of state legislatures?

It is submitted that the only proper role for the United States Supreme Court is that of a neutral umpire in deciding the cases and

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[45]377 U.S. 678 (1964).

[46]*Id.* at 690.

[47]377 U.S. 695 (1964).

[48]*Id.* at 708.

controversies properly before it.[49] A major league baseball umpire may have sincere legitimate reasons for preferring that one team win rather than another. Nevertheless, if umpiring is to survive—and indeed if major league baseball itself is to survive—he must call every play as he sees it, not as he wishes it were. So it is with the Supreme Court. If the Supreme Court is to survive as an institution in American life and government it must not allow itself to become one of the political branches of government. It must be admitted that government could be so structured that a highest court would be constitutionally a super-legislature—just as government could be so structured that a court of the Union could sit in judgment of the decisions of the Supreme Court. But neither of these was in our Constitution as originally adopted, neither is in our Constitution now, and if either should become part of the structure of our government—whether by constitutional amendment or otherwise—the entire fabric of our federalism would be twisted out of shape.

The second, and closely related, real issue is whether the federal courts have any proper role in the reapportionment of state legislatures. It is contended by some that the equal protection clause of the fourteenth amendment to the United States Constitution confers such a role upon the federal courts, and indeed, the holdings in the *Baker* and *Reynolds* cases are to that effect. The obvious place to look in order to test that contention and holding is the United States Constitution itself.

There are a number of possible ways to approach the Constitution with this question. One such way is to look at the powers of all branches of the national government. Article I, section 8, specifies the powers of Congress. Nowhere among them is there anything which might be construed as giving it a role in the reapportionment of state legislatures. Article II, section 2, sets out the powers of the President, and article II, section 3, specifies certain duties. Reapportionment of state legislatures is found among neither. The extent of the judicial power is defined in article III, section 2, and in the eleventh amendment. Significantly, there is nothing which can be read into these provisions as granting any jurisdiction over the reapportionment of state legislatures. Set off against these provisions is article I, section 10, which establishes limitations on the powers of individual states. None of these limitations in any way precludes any state from apportioning its own legislature in any manner whatever. The ninth amendment makes it clear that the enumeration of certain rights does not deny or disparage others, which are retained by the people. Also, pursuant to the tenth amendment the powers not delegated to the United States, nor prohibited to the states, are reserved to the states, or to the people.

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[49]Weschsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

All of this makes a clear pattern denying to the national government—and certainly to the federal courts—any role in the discretionary aspects of the reapportionment of state legislatures.

If this were not enough, however, there are other provisions dealing specifically with voting which indicate that all general jurisdiction over voting rights is in the states. For example, article I, section 2, paragraph 1, says that the electors in each state of members of the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the state legislature, clearly a recognition of the general jurisdiction of the state in setting voting qualifications in the first instance.[50] The manner of the selection of electors for President and Vice President is specifically a function of the states, in accordance with article II, section 1, paragraph 2.

Another way to approach the Constitution with this problem is to see if the national government has any jurisdiction at all over voting. We find that there are several grants of such jurisdiction—all specific, none general. Section 2 of the fourteenth amendment, when read together with section 5 thereof, gives Congress the power to reduce the basis of representation of any state in the House of Representatives under certain specified circumstances. Section 1 of the fifteenth amendment provides that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude, and section 2 thereof gives Congress the right to enforce section 1. The seventeenth amendment provides for the direct popular election of United States Senators, and the nineteenth amendment provides that the right of citizens of the United States to vote shall not be denied or abridged on account of sex. The national government would not otherwise have even so relatively unimportant a power as the right to make or alter regulations for the times, places, and manner of holding elections for Senators and Representatives if this power had not been given to Congress by article I, section 4, paragraph 1.

Thus, it is manifest that the national government has no general jurisdiction over voting and elections. Otherwise, section 2 of the fourteenth amendment, section 1 of the fifteenth amendment, the seventeenth amendment, the nineteenth amendment, and article I, section 4, paragraph 1, *all would have been totally unnecessary.* It is axiomatic in construing statutes that the legislature never will be presumed to have done a useless act. This canon applies with increased vigor when construing so dignified a document as a constitution.

The holdings of the majority in *Baker v. Carr* and *Reynolds v. Sims* were bottomed on the equal protection clause of section 1 of the fourteenth amendment. It is only proper, therefore, that we examine this

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[50]*But see* Wesberry v. Sanders, 376 U.S. 1 (1964).

clause. It reads, in pertinent part: "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." The majority held that this language gives the federal courts a role in the discretionary aspects of the reapportionment of state legislatures. It is significant that the fourteenth amendment was proposed on June 16, 1866, and declared ratified on July 28, 1868. Less than seven months later, on February 27, 1869, the fifteenth amendment was proposed, and it was declared ratified on March 30, 1870. If, one might ask, the fourteenth amendment means what the majority of the Court says it means, why was the fifteenth amendment proposed and ratified? If the fourteenth amendment has the meaning assigned to it by the Court the fourteenth amendment would do for voting rights everything the fifteenth amendment does, and more. It follows that there would have been no need for the fifteenth amendment, which was virtually contemporaneous with the fourteenth amendment, but, significantly, proposed and ratified shortly afterward in full current knowledge of the fourteenth amendment.[51]

Furthermore, if the words of the equal protection clause mean what the majority in *Baker v. Carr* and *Reynolds v. Sims* assigned to them, then they affect much more than reapportionment of state legislatures. The protection extends to "*any person within* [the] *jurisdiction*" of the state. If this means what the majority in *Baker v. Carr* said it means then, of necessity, it also means that the state could not deny a vote to (1) a non-citizen, (2) a non-resident passing through the state on election day, (3) an idiot, (4) a four-year-old child (or, indeed, a four-day-old child), or (5) one who had on that same election day already voted in several other states. This, it is submitted, is too much.

The majority holdings in *Baker v. Carr* and *Reynolds v. Sims* thus reveal themselves as incorrect statements of constitutional law, and consequently as an unwarranted exercise in judicial legislation. Article V of the United States Constitution spells out the procedure for amending the Constitution. The Supreme Court has no role in that process. Nevertheless, if the Court has done anything in *Baker v. Carr* and *Reynolds v. Sims*, it assuredly has amended the United States Constitution.

Article IV, section 4, guarantees to every state a republican form of government. After *Baker v. Carr* and *Reynolds v. Sims* does any state still have a republican form of government? Obviously, the answer to this question depends upon one's definition of "republican." Regardless of how one answers this question, it is clear that the relationship between

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[51]It is significant that as recently as 1960 the United States Supreme Court applied the fifteenth amendment, rather than the fourteenth amendment, in a case of deprivation of the right to vote based on color. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

the states and the national government has been so altered by *Baker v. Carr* and *Reynolds v. Sims* that these decisions may well prove to be the death-knell of federalism.

The majority holdings in *Baker v. Carr* and *Reynolds v. Sims* being incorrect statements of constitutional law the law must be taken from *Colegrove v. Green.* In *Colegrove v. Green* the plaintiff-appellants were qualified voters in the State of Illinois. They were qualified to vote in congressional districts which had much larger populations than some of the other congressional districts in Illinois. The plaintiffs sought a decree declaring the provisions of the 1901 Illinois districting statute invalid as in violation of various provisions of the United States Constitution and in conflict with the United States Reapportionment Act of 1911.

The United States Supreme Court was of the opinion that the appellants were asking it to do what is beyond its competence to grant.[52] It was one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It was found that the issues must be resolved by considerations on the basis of which the Supreme Court from time to time has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

Thus it is concluded that the federal courts have no proper role in the discretionary aspects of the reapportionment of state legislatures.

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[52]Colegrove v. Green, 328 U.S. 549 (1946).

STATE JURISDICTION AND UNION SECURITY—ANOTHER LOOK AT THE RIGHT-TO-WORK LAW

*Robert C. Travis**

I. Introduction

The success or failure of unions rests finally on achievement of the objectives of their members, but some union objectives are directly concerned with the welfare and strength of the unions themselves, and only indirectly with the benefit of the individual working man. Such a group of objectives may be referred to under the broad heading of "union security."[1] The term "union security" is understood to mean all forms of compulsory unionism, including check-off of union dues. Compulsory unionism covers all arrangements under which union membership becomes in greater or lesser degree, a condition of employment. Generally based upon an agreement between an employer and a union, compulsory unionism gives the union a power over employment originally held only by the employer, and, in fact, it represents a grant of power by the employer to the union. In its strongest expression, the closed shop agreement, compulsory unionism leaves to the union virtually complete control over hiring—a man seeking a job must be a union member.

The five basic types of compulsory unionism are: (1) the closed shop, (2) the union shop, (3) maintenance of membership, (4) preferential hiring, and (5) agency shop.[2] Compulsory unionism has been strictly regulated by federal legislation. The closed shop and preferential hiring have been indirectly abolished by the provisions of section 8(a)(3) of the National Labor Relations Act,[3] and the union shop and maintenance of membership have been allowed only on certain conditions.[4] The agency shop, a relatively new form of union security, has been held lawful by the United States Supreme Court.[5]

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*Wise, Smith and Carter, Jackson, Mississippi.

[1]See generally Murphy, *The "Right to Work" Statute,* 26 Miss. L.J. 39, 40 (1954). (Reasons for and against union security devices are analyzed.)

[2]See generally 2 CCH Lab. Rel., Lab. L. Rep. ¶¶ 4500-4600, for a full discussion of all forms of union security devices.

[3]73 Stat. 525 (1959), 29 U.S.C § 158(a)(3) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. V, 1959-63). For convenience, the National Labor Relations Act is sometimes abbreviated "NLRA" and the National Labor Relations Board is abbreviated either "NLRB" or "Board" in this article.

[4]See generally 2 CCH Lab. Rel., Lab. L. Rep. ¶ 4520.

[5]NLRB v. General Motors Corp., 373 U.S. 734 (1963). Section 8(a)(3) per-

So-called "right-to-work" laws, such as the Mississippi "right-to-work" statute,[6] have been sanctioned by section 14(b) of the NLRA which provides that the states may forbid "agreements requiring membership in a labor organization as a condition of employment."[7] Where applicable, these state laws supersede the NLRA provisions permitting union security contracts, but do not prevail over the union security provisions of the Railway Labor Act.[8]

No employer whose activities affect interstate commerce may enter into a closed shop or preferential hiring agreement.[9] Additionally, if an employer, except a carrier subject to the Railway Labor Act, is located in a state in which union shop or maintenance of membership agreements are prohibited, such as is the case of a Mississippi employer, he is also precluded from executing those types of agreements.[10] By being precluded from executing these forms of union security agreements, the employer is likewise precluded from the necessity of engaging in collective bargaining over provisions in contracts relating to these forms of union security. For the employer in Mississippi, the subject matter of collective bargaining conferences is thus reduced considerably.

For strictly intrastate employers—those whose activities do not affect commerce—and for employers in operations over which the NLRB will not exercise its jurisdiction, the NLRA does not apply.[11] It should be noted that the NLRB has never been either willing or able to exercise its jurisdiction over all labor disputes affecting interstate commerce.

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mits agency shop agreements under which employees are required, as a condition of employment, to pay union sums equal to union membership dues and fees. The Court found agency shops were practically equivalent to union shops since the only membership obligations enforceable under a union shop contract are those relating to payment of periodic dues and fees.

[6]MISS. CONST. art. 7, § 198-A; MISS. CODE ANN. § 6984.5 (Supp. 1964).

[7]Labor Management Relations Act (Taft-Hartley Act) § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

[8]64 Stat. 1238 (1951), 45 U.S.C. §§ 151(a), 152 (1958). The Railway Labor Act as amended, specifically authorizes union-shop contracts notwithstanding any other statute or law of any state and therefore, it pre-empts the field. State right-to-work laws, therefore, furnish no basis for enjoining carriers from enforcing union shop contracts authorized and executed under the provisions of § 11. See, *e.g.*, Railway Employees Dep't v. Hanson, 351 U.S. 225 (1955).

[9]See note 3 *supra*.

[10]The right-to-work law in Mississippi is aimed at all forms of union security devices. See note 6 *supra*.

[11]Application of the NLRA to a particular case is determined by whether or not a "labor dispute" if one exists, would tend to burden, obstruct, or, in general, "affect" interstate or foreign "commerce." If it would, the statute applies and the NLRB has authority to act. The terms, "labor dispute," "affecting commerce," and "commerce" are terms of art defined in the Act itself at § 2. See generally 1 CCH LAB. REL., LAB. L. REP. ¶ 1610.

The Board has, therefore, limited its own jurisdiction by establishing certain guidelines.[12] These guidelines were given express statutory approval in 1959 by the Labor Management Reporting and Disclosure Act, subject to the proviso that the Board may not decline cases meeting the guidelines which prevailed on August 1, 1959.[13]

II. Doctrine of Pre-emption

In *Garner v. Teamsters, Local 776*,[14] the United States Supreme Court enunciated the "pre-emption doctrine" in the field of labor relations. The Court held that where interstate commerce was affected, federal laws pre-empted state jurisdiction to the extent that they either prohibited or protected conduct in employer-employee relations. State laws regulating the same conduct or activity could not be applied. The NLRB was charged with the administration of federal law and its jurisdiction was exclusive, even though it had actually declined, or would decline, under self-imposed restraints to exercise its jurisdiction.

The NLRB's policy of refusing to exercise jurisdiction over certain disputes not meeting its guidelines gave rise to the question of the availability of state protection for persons injured by unfair practices, but unable to obtain relief from the NLRB. This question was answered initially by the now famous decisions in *Guss v. Utah Labor Relations Bd.*,[15] *San Diego Bldg. Trades Council v. Garmon*,[16] and *Meat Cutters, Local 427 v. Fairlawn Meats, Inc.*[17] in which the Supreme Court ruled that the NLRB completely displaced state jurisdiction even in those cases where the Board had declined or likely would decline jurisdiction. In *Guss*, the Court stated:

> We are told by appellee that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land. Congress is free to change the situation. . . .[18]

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[12]NLRB Press Release No. R-576, Oct. 2, 1958.

[13]Labor Management Reporting and Disclosure Act of 1959 § 701(a), 73 Stat. 541 (1959), 29 U.S.C. § 164(c) (Supp. V, 1959-63).

[14]346 U.S. 485 (1953).

[15]353 U.S. 1 (1957).

[16]353 U.S. 26 (1957).

[17]353 U.S. 20 (1957).

[18]Guss v. Utah Labor Relations Bd., *supra* note 15, at 10-11.

Two years later Congress did change the situation by amending the NLRA, adding section 14(c)(2)[19] which provided that nothing in the NLRA should be deemed to prohibit any state from asserting jurisdiction over disputes declined by the NLRB under its jurisdictional guidelines. The express purpose of this legislation was to eliminate the no-man's-land created by *Guss*. The Supreme Court's pre-emption doctrine did, however, continue to apply with respect to those cases in which the Board could and would exercise jurisdiction.

The expanding concept of federal pre-emption has obviously narrowed the jurisdiction of the states. For a time after *Garner*,[20] it appeared that the area left for state regulation was substantial. The states apparently retained jurisdiction over labor activity, not specifically regulated by federal law. As the full import of the pre-emption doctrine developed, however, jurisdiction of the states became more and more limited.

For jurisdictional purposes, strikes, picketing, and other concerted activities may be categorized into three areas. Some of these activities, like the ordinary economic strike and related picketing in industries affecting commerce, come clearly within the protection of section 7 of the NLRA.[21] Clearly prohibited as unfair labor practices under section 8(a) and 8(b)[22] are other kinds of employer and union activities. The states do not have jurisdiction to prohibit or otherwise regulate this activity because the state remedy would conflict with the remedy provided by the NLRA. Still there is some activity not protected under the federal law by section 7, nor proscribed in section 8(a) and 8(b), and it is in this area, not regulated by federal law, that the states have been free to act in regulating certain union activities. This principle was recognized by the Supreme Court in *Automobile Workers, AFL, Local 232 v. Wisconsin Employment Relations Bd.*[23] In this case the union conducted a series of intermittent walk-outs. The Court, without a prior determination by the Board, ruled that this strike technique was not a protected activity under section 7. It noted that the activity likewise fell outside the proscriptions of section 8(b) relative to unfair labor practices. The Court held that the state was free to act in this area and that a state board could issue an order to restrict the union strike activity.

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[19]Labor Management Reporting and Disclosure Act of 1959 § 701(2), 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(2) (Supp. V, 1959-63).

[20]Garner v. Teamsters, Local 776, 346 U.S. 485 (1953).

[21]61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

[22]National Labor Relations Act §§ 8(a), (b), 49 Stat. 452 (1947), 29 U.S.C. § 158(a), (b) (1958).

[23]336 U.S. 245 (1949).

After *Garner*,[24] there followed a whole series of decisions by state courts permitting injunctions against activity not covered by the federal law.[25] In other cases arising under the NLRA, the Board and the federal courts further defined areas of "unprotected activity."[26]

In order to secure a remedy in state court against union activity, an employer has the dual problem of showing that the activity is neither protected under section 7, nor prohibited under section 8(b) of the NLRA, and that it thus falls within an area subject to state court jurisdiction. Obviously, an employer must also state a cause of action entitling him to relief under the state law. Prior to the Supreme Court's decision in *San Diego Bldg. Trades Council v. Garmon*,[27] in 1959, numerous state court decisions held that union activity could be regulated where one of its prime purposes was directed at activity in violation of state policy expressed in state right-to-work laws.[28] Following *Garmon*, decisions in later cases have left less room for state regulation of labor disputes on the basis of local law and policy.

III. Jurisdiction to Determine "Activity Arguably Protected or Prohibited"

In the now famous *Garmon* decision,[29] the Supreme Court determined that the NLRB must make the first determination wherever union activity is "arguably protected or prohibited by federal law." The Court stated that the basic consideration is whether or not there is a ground for argument that the activity is either protected or prohibited by the NLRA. It emphasized the exclusive competence of the Board to make the determination whether the activity is "arguably" subject to section 7 or section 8. The primary jurisdiction thus rests with the NLRB. The Court said:

> In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling

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[24]Garner v. Teamsters, Local 776, *supra* note 20.

[25]*E.g.*, Co-operative Refinery Ass'n v. Williams, 185 Kan. 410, 345 P.2d 709 (1959), *cert. denied*, 362 U.S. 920 (1960).

[26]*E.g.*, Automobile Workers v. McQuey, Inc., 351 U.S. 959 (1956) (mass picketing, threatening employees with physical injury or property damages, obstructing entrance to and exits from employers' property, obstructing streets and public roads surrounding plant, and picketing homes of employees); Automobile Workers, AFL, Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (temporary work stoppages).

[27]359 U.S. 236 (1959).

[28]*E.g.*, International Ass'n of Machinists, AFL v. Goff-McNair Motor Co., 223 Ark. 30, 264 S.W.2d 48 (1954). See generally Murphy, *The "Right to Work" Statute*, 26 Miss. L.J. 39, 47 (1954).

[29]San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

> precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.[30]

The *Garmon* rule has been followed by the Supreme Court in subsequent cases.[31]

It is axiomatic that most concerted activities coming to the attention of the court may "arguably" be regulated by federal law. Therefore, the primary jurisdiction to determine coverage, and hence pre-emption, usually rests with the NLRB, but the party desiring that determination may have a difficult problem. If the conduct in question is arguably *prohibited* by federal law, a determination of that question can be obtained through the filing of an unfair labor practice charge under section 8.[32] However, if the question relates to the protected nature of the activity under section 7,[33] there is no practical way to secure a determination of that question. An activity that is arguably protected is apparently removed from state jurisdiction as effectively as one that is fully protected.

The NLRB has made determinations regarding the protected or unprotected nature of various kinds of employer or union activities, but these rulings have been made generally in cases where employers or unions were charged with unfair labor practices under section 8(a) or section 8(b). If an employer is charged with discharging an employee because of his participation in a particular concerted activity, the Board must determine whether the activity is protected by section 7. If it is protected, the employer is guilty of an unfair labor practice. If it is unprotected, the employer is free to discharge employees for their participation in it, but the employer cannot go to the Board and secure a determination of the protective or unprotective nature of their activity.[34] He must act on his own in either firing or retaining the employee, or subjecting him to other disciplinary measures, and face the possible

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[30]*Id.* at 246.

[31]*E.g.*, Construction & Gen. Laborers' Union, Local 438 v. Curry, 371 U.S. 542 (1963).

[32]National Labor Relations Act § 8, 49 Stat. 452 (1947), 29 U.S.C. § 158 (1958).

[33]National Labor Relations Act § 7, 49 Stat. 452 (1947), 29 U.S.C. § 157 (1958).

[34]There is no provision made in the NLRA for advisory opinions, except advisory opinions may be secured from the Board in order to resolve doubt as to whether or not the Board would assert jurisdiction of a case based on its current jurisdictional standards. See 29 C.F.R. §§ 102.98-.110 (1959). These advisory opinions, however, are specifically limited to the jurisdictional issues involved in a particular matter and do not pertain to the merits of a case or to the question of whether the subject matter of the controversy is governed by the NLRA. Spears-Dehner, Inc., 139 N.L.R.B. 922 (1962).

consequences which may later be brought out in a charge against him for an unfair labor practice.

Where there is violence or an imminent threat to the public order, the states have jurisdiction to grant injunctions and to award damages.[35] Activity of this kind brings into play the state's police power, and the state jurisdiction is not defeated by the fact that the same coercive activity may also constitute an unfair labor practice under the NLRA.[36] State jurisdiction in this area is largely unaffected by the doctrine of federal pre-emption even in its expanded form following the *Garmon* decision.

IV. Jurisdiction Under Right-To-Work Statutes

Some of the more recent significant developments in the field of federal pre-emption have involved the state right-to-work laws. As previously noted, under section 14(b) of the NLRA, the states are permitted to restrict the union security arrangements which would otherwise be permitted under the proviso of section 8(a)(3).[37] Although the state's right to have a so-called "right-to-work" law is specifically protected by the NLRA, there has always been a question about the effect of such a law on section 8(a)(3) itself, and about the extent of the state's power to enforce a right-to-work law.

Any arrangement or contract requiring union membership as a condition of employment would constitute an unfair labor practice under section 8(a)(3), unless it came within the proviso clause of section 8(a)(3).[38]

The proviso permits a union shop contract with a 30-day escape period. It could be argued that the effect of the state right-to-work law is merely to eliminate the benefit of the proviso to section 8(a)(3) so that section 8(a)(3) could be read without any saving factor whatsoever,

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[35]*E.g.*, International Woodworkers v. Fair Lumber Co., 232 Miss. 401, 99 So. 2d 452 (1958); United Bhd. of Carpenters of America v. Pascagoula Veneer Co., 228 Miss. 799, 89 So. 2d 711 (1956); Southern Bus Lines, Inc. v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, 205 Miss. 354, 38 So. 2d 765 (1949). The NLRA does not deprive state courts of jurisdiction over traditionally local matters of public safety and order such as mass picketing, threats and violence, obstruction of streets or picketing of homes.

[36]*E.g.*, International Ladies Garment Workers Union, Local 415 v. Sherry Mfg. Co., 115 So. 2d 27 (Fla. 1959).

[37]*E.g.*, Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949).

[38]National Labor Relations Act § 8(a)(3), as amended by § 201(e) of Labor Management Reporting and Disclosure Act in 1959, 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(3) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. V, 1959-63).

resulting in a requirement that any union security contract in a state like Mississippi, having a right-to-work law outlawing all forms of union security, will constitute a violation of section 8(a)(3). Any union security contract, or any discharge thereunder, would be an unfair labor practice under section 8(a)(3), and it could be argued that the states, in this situation, would be powerless to enforce the right-to-work statute specifically permitted by section 14(b).

Under the opposing view, a right-to-work law could be enforced in state court by enjoining the contract or discharge thereunder where the contract violated the state right-to-work law. From this viewpoint, a union security arrangement within the proviso of section 8(a)(3) would not constitute an unfair labor practice even though it occurs in a right-to-work law state.

With regard to a state's power to enforce its right-to-work law, a distinction must be drawn between actions involving enforcement of outlawed union security contracts, and actions involving picketing or other forms of concerted activities where one of the objects of the activity is to force an employer to sign a union security arrangement in contravention of state law.

Several significant cases have dealt with the state's power to enforce its right-to-work law by enjoining picketing where one of the objects of the picketing was to force the employer to sign a union security contract illegal under the state law. In the *Farnsworth*[39] and *Curry*[40] cases, the Court found that peaceful picketing was being conducted with an object of forcing the employer to enter into a union security arrangement which was illegal both under state law and under section 8(a)(3). The Court found that there was "arguably" an unfair labor practice involved under section 8(b). For this reason the Court held that federal pre-emption applied and that the states did not have jurisdiction to enforce their right-to-work law by enjoining the picketing even though the violation clearly involved the state law. Prior to *Garmon*,[41] in 1959, numerous state court decisions had been to the contrary.[42]

Reaching a similar result, the Supreme Court dealt rather summarily with the only Mississippi case decided on this question, *Hattiesburg Bldg. & Trades Council v. Broome*.[43] In *Broome*, a labor organization picketed an oil refinery for the purpose of forcing the refinery to require a

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[39]Farnsworth & Chambers Co. v. Local 429, Int'l Bhd. of Elec. Workers, AFL, 201 Tenn. 329, 299 S.W.2d 8, *rev'd mem.*, 353 U.S. 969 (1957).

[40]Construction & Gen. Laborers' Union, Local 438 v. Curry, *supra* note 31.

[41]San Diego Bldg. Trades Council v. Garmon, *supra* note 29.

[42]*E.g.*, Grimes & Haver, Inc. v. Pollock, 163 Ohio St. 372, 127 N.E.2d 203 (1955).

[43]84 Sup. Ct. 1156 (1964).

non-union industrial maintenance firm doing work at the refinery to sign an exclusive hiring hall agreement with the union. An injunction was obtained in chancery court and upheld by the Mississippi Supreme Court in a lengthy opinion wherein the Court found that the object of the picketing was to force Broome to employ only union labor in violation of Mississippi's right-to-work law. The Court attempted to distinguish the *Farnsworth*[44] and *Curry*[45] cases on the grounds that in *Broome* there was not even "arguably" an unfair labor practice involved since there was no "labor dispute" between Broome and his employees and since Broome was not engaged in interstate commerce. The Court rejected both contentions and found that the union's activities were arguably unfair labor practices, subject to the exclusive jurisdiction of federal law.

On the question of whether or not a state has the power to enforce its ban on various forms of union security agreements, the Supreme Court has reached a different result. In *Retail Clerks Int'l Ass'n v. Schermerhorn*,[46] a case decided under the Florida right-to-work statute, the Court considered the validity and enforceability of an "agency shop" arrangement. The union and the employer negotiated a collective bargaining agreement that contained an agency shop clause providing that the employees covered by the contract who chose not to join the union were required "to pay as a condition of employment, an initial service fee and monthly service fees" to the union. Non-union employees brought suit in a Florida court to have the agency shop clause declared illegal and to have an injunction issued against enforcement of the contract. The Florida Supreme Court held that this union security contract violated the Florida right-to-work statute and that the Florida courts had jurisdiction to issue an injunction enjoining enforcement of the contract. The United States Supreme Court agreed. First, the Court concluded that the arrangement whereby non-union employees were required to pay service fees equal to regular membership dues to the union was tantamount to a union shop contract for the purpose of section 14(b) and section 8(a)(3). It likewise held it was for the state to determine whether such an arrangement violated state law, and the Court considered itself bound by the state court ruling.

In *Schermerhorn*, the Court enunciated the policy that section 14(b) must be construed as recognizing state authority to invalidate federally permissable union security contracts:

> We start from the premise that, while Congress could preempt as much or as little of this interstate field as it chose, it

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[44]See note 39 *supra*.

[45]See note 40 *supra*.

[46]373 U.S. 746, *reargued*, 375 U.S. 96 (1963) (reargument on question of whether Florida courts have jurisdiction to afford a remedy for violation of state law).

> would be odd to construe § 14(b) as permitting a State to prohibit the agency clause but barring it from implementing its own law with sanctions of the kind involved here.[47]

Since section 14(b) constitutes congressional recognition of the fact that a uniform national policy with respect to union security contracts is not necessarily desirable, the Court said that violations of a state right-to-work law should not be found to be unfair labor practices capable of being enforced only under federal law. In its holding the Court went one step further in stating that the jurisdiction of state courts in these cases extended only to penalizing the actual making of the union security contract and of enjoining the enforcement or the making of the contract. It stated that picketing by a labor organization to compel an employer to enter into a union security contract, even though the contract would definitely be in violation of the state right-to-work law, was still an activity subject either to federal protection or prohibition, and thus could not be dealt with except under the provisions of the NLRA. The Court emphasized that the state powers begin "*only with actual negotiation and execution of the type of agreement described by § 14(b).*"[48] In the absence of such an agreement the Court said that conduct was "arguably" an unfair labor practice, and thus one, which, under the *Garmon* decision,[49] was subject to federal pre-emption.

Thus, a state agency may issue a cease and desist order against an employer to restrain him from giving effect to a maintenance of membership agreement and order the reinstatement with back pay of an employee discharged in violation of a state union security law;[50] but picketing in order to get an employer to execute an agreement in violation of a state union-security statute would lie exclusively in the federal domain, because the state power recognized and contemplated by section 14(b) begins only with the actual negotiation and execution of the type of agreement described by that section.[51]

There is still some doubt concerning the state's jurisdiction to regulate picketing where the object of that picketing is to secure a union shop contract within the provisions of section 8(a)(3), and where the contract would, if executed, violate the state's right-to-work law. The dictum in the *Schermerhorn*[52] case appears to indicate that the states would not have such power. However, this point has not been specifically litigated. If the contract sought by the union is clearly within the proviso

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[47]*Id.* 375 U.S. at 99.

[48]*Id.* at 105.

[49]San Diego Bldg. Trades Council v. Garmon, *supra* note 29.

[50]Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., *supra* note 37.

[51]Retail Clerks Int'l Ass'n v. Schermerhorn, *supra* note 46.

[52]*Ibid.*

to section 8(a)(3), and not violative of any other provisions of the NLRA, it does not appear that the picketing would constitute even arguably an unfair labor practice. Since the contract would still violate a state law permitted under section 14(b), it appears doubtful that the activity could be considered as coming within the protection of section 7.[53] However good the logic of this approach may be, in view of *Schermerhorn*, it appears that state jurisdiction of peaceful picketing has been ousted.

V. Conclusion

In spite of the apparently ever-narrowing field of state jurisdiction over labor matters, the Mississippi right-to-work statute continues to be an effective bulwark of employee freedom or a thorn in the side of unionism, depending upon one's point of view. Although the future of section 14(b) appears in doubt, while it remains in effect, all forms of union security devices are banned in Mississippi under the broad language of our statute. Employers are not obligated nor permitted to bargain collectively on the subject of union security. The subject matter of collective bargaining is thus effectively reduced.

Though picketing and other forms of employee activities may not be the subject of state jurisdiction where the activity is "arguably" protected or prohibited under the NLRA, there is still an area subject to state jurisdiction. The state's police power remains unaffected by the NLRA and states may exercise jurisdiction in those matters over which the NLRB declines jurisdiction under its jurisdictional guides. State jurisdiction is not curtailed by the NLRA unless a dispute affects interstate commerce.

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[53]The question of picketing is a complex one, however, involving certain free speech aspects and a determination of the purpose for which the picketing was being conducted conceivably could bring the picketing within the ambit of protection afforded by § 7. See generally 3 CCH Lab. Rel., Lab. L. Rep. ¶¶ 5110-85.

JUDICIAL REVIEW OF THE MISSISSIPPI STATE OIL AND GAS BOARD

*Walker L. Watters**

I. Introduction

The State Oil and Gas Board is an administrative agency created by act of the Mississippi Legislature. Its purpose is to promote development of the natural resources of oil and gas in the State of Mississippi in a manner which prevents waste and protects individual rights.[1] In order to achieve this purpose the legislature created a board which is not exclusively executive, judicial, or legislative but which is administrative and actually a fourth department of government.[2] The purpose of this article is to discuss the extent to which, and the manner in which, actions of the board may be judicially reviewed. The problems encountered herein arising from the relationship of the administrative to the judicial branch break down upon analysis into two main issues: (1) the scope and extent of review, and (2) the procedure for invoking that review. A discussion of all aspects of judicial review of administrative agencies is beyond the scope of this article, for this article is limited to a consideration of Mississippi statutes and case decisions pertaining to judicial review of the State Oil and Gas Board.

II. Scope and Extent of Review

A. Constitutional Limitations

The first problem encountered in considering the scope and extent of judicial review of the State Oil and Gas Board arises from the separation of powers provided for by the Mississippi Constitution. This constitution provides that the powers of the government of the State of Mississippi shall be divided into three distinct departments: those which are legislative to one, those which are judicial to another, and those which are executive to another.[3] No person or collection of persons, being one or belonging to one of these departments, is permitted to exercise any power properly belonging to either of the others.[4] The State Oil and Gas Board is a creature of the legislature, and its actions emanate from

* Wells, Thomas & Wells, Jackson, Mississippi.

[1]Miss. Code Ann. § 6132-01 (1952).

[2]Harper, *Administrative Procedure Before the State Oil and Gas Board,* 29 Miss. L.J. 82 (1957).

[3]Miss. Const. art. 1, § 1.

[4]Miss. Const. art. 1, § 2.

powers delegated to it by the legislature to be performed in a manner and scope in which the legislature itself could have acted. The question arises as to what extent actions of the board are legislative and to what extent they can be reviewed by a court. If a review court substituted its own opinion for that of the board, would not this be a violation of the separation of powers since the reviewing court would in fact be acting in a legislative capacity?[5]

This problem was presented to the Mississippi Supreme Court in *California Co. v. State Oil and Gas Bd.*[6] In this case the issue was the scope of the review available to a circuit court on an appeal from a decision of the State Oil and Gas Board granting an exception to spacing of wells. The court first found that the legislature had the right to prescribe general rules and regulations as to the spacing of oil and gas wells and to provide exceptions thereto under given circumstances and that it had the right to delegate this legislative power to a special administrative agency. It then discussed the nature of the Board's action pursuant to this delegation of power:

> And it is to be conceded that in adopting such general rule and regulation, the Oil and Gas Board was acting in a legislative capacity; and we are of the opinion that in granting the exception involved in the instant case to the said general rule and regulation the said Board was likewise acting in at least a quasi legislative capacity. In order that any hearing shall be judicial in character, it must proceed upon past or present facts as such, which are of such nature that a judicial trial tribunal may find that they do or do not exist, while in making these conservation rules and the exceptions thereto the larger question is one of state policy. So that what is to be made of the facts depends upon their bearing upon a legislative policy for which persons of special training and special responsibility have been selected.[7]

The court concluded that the board's order granting an exception to spacing of wells was legislative and that the circuit court was without constitutional power on appeal to substitute its own opinion, as to what are proper oil conservation measures, for that of the State Oil and Gas Board on a legislative or administrative question.

B. Review Permitted

It is not suggested, however, that actions of the board are not subject to judicial review. The court held in the above case, as it has held in numerous other cases,[8] that appellate courts have the authority to

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[5]See California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542, *suggestion of error overruled,* 200 Miss. 825, 28 So. 2d 120 (1946).

[6]*Ibid.*

[7]*Id.* at 840, 27 So. 2d at 545.

[8]*E.g.*, Board of Supervisors v. McCormick, 207 Miss. 216, 42 So. 2d 177 (1949).

review administrative decisions to determine whether or not the decision or action of the administrative agency is supported by substantial evidence, is arbitrary and capricious, is beyond the power of the agency to take, or violates some constitutional right of the complaining party.

The determination of whether a decision extends beyond the power of the board depends upon an interpretation of the enabling statutes[9] and upon an examination of constitutional limitations.[10] These issues, and the issue of whether someone's constitutional rights have been violated by a board's action, are judicial issues within the inherent jurisdiction of a court.[11]

Whether a decision is based upon substantial evidence or is arbitrary or capricious is a question of law on judicial review.[12] The determination of whether an action or decision is based upon substantial evidence or is arbitrary or capricious is made upon an examination of the evidence presented to the agency and upon which it acted. In making this determination, the reviewing court must be careful not to interfere with the proper exercise of discretion of the administrative agency[13] and must be careful not to substitute its determination of what is wise or unwise for that of the agency.[14] The reviewing court's function is to consider the reasonableness of the determination.[15]

Much has been said about judicial review of evidence before an administrative agency. Ordinarily appellate courts will not pass on the weight of the evidence where the same is conflicting in substantial particulars and determine where the preponderance lies. But where the finding is not supported by substantial evidence, the court can, as a matter of law, determine that the finding is based upon insufficient evidence.[16] Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that cannot be defined definitely,[17] but whether the evidence in a particular case is sub-

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[9]Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909).

[10]Dixie Greyhound Lines, Inc. v. Mississippi Pub. Serv. Comm'n, 190 Miss. 704, 200 So. 579, *suggestion of error overruled,* 190 Miss. 705, 1 So. 2d 489 (1941).

[11]Board of Supervisors v. McCormick, *supra* note 8.

[12]Dixie Greyhound Lines, Inc. v. Mississippi Pub. Serv. Comm'n, *supra* note 10.

[13]Campbell Sixty-Six Express, Inc. v. Delta Motor Line, Inc., 218 Miss. 198, 67 So. 2d 252 (1953).

[14]County Bd. of Educ. v. Parents & Custodians of Students, 168 So. 2d 814 (Miss. 1964).

[15]Dixie Greyhound Lines, Inc., v. Mississippi Pub Serv. Comm'n, *supra* note 10.

[16]Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So. 2d 356 (1953).

[17]However, in Central Elec. Power Ass'n v. Hicks, 236 Miss. 378, 389, 110 So. 2d 351, 357 (1959), the Mississippi Supreme Court defined the term as follows: "Substantial evidence is more than a scintilla. It 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Sub-

stantial must be determined from the facts of each case as it arises.[18] Nevertheless, it has been recognized in a large number of cases in recent years that the phrase "substantial evidence" does serve as a standard for review.

In order to consider whether there is substantial evidence, the reviewing court must determine which facts are binding upon the court and which are reviewable. In the case of *Central Elec. Power Ass'n v. Hicks*,[19] the Mississippi Supreme Court discussed what constitutes substantial evidence to support an agency's finding of fact, and in doing so it analyzed which facts are binding on the court and which can be reviewed. The opinion stated that the legal effect of the evidence, and the ultimate conclusions drawn by an administrative tribunal from the facts, as distinguished from its findings of primary, evidentiary, or circumstantial facts are questions of law, especially where the facts are undisputed or the overwhelming weight of the evidence reflects them. The court then cited the applicable section in American Jurisprudence, and the following passage is quoted from it to explain in more detail the court's position:

> There are two kinds of facts: ultimate facts and evidentiary, sometimes called basic or primary, facts. Ultimate facts are those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other. An ultimate fact is the final resulting effect which is reached by process of logical reasoning from the evidentiary fact. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.
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> The various rules as to conclusiveness of findings of fact are sometimes stated in terms of findings relating to the evidentiary facts in contrast to ultimate conclusions. Thus, it is stated that inferences from the evidentiary facts, or ultimate conclusions to be drawn from the facts, as distinguished from findings of primary, evidentiary, or circumstantial facts, present a question which may be reviewed, or a mixed question of law and fact on which the court may substitute its judgment for that of the agency, or a question of law, or a clear-cut question of law. It has also been said that the legal effect of evidence is a question of law.[20]

The court in the *Hicks* case further discussed the nature of the review of evidence and stated that a court cannot conceivably appraise the

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stantial evidence 'means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . .'"

[18]ICC v. Mississippi Pub. Serv. Comm'n, 349 U.S. 908 (1955), *affirming* 124 F. Supp. 809 (1954).

[19]236 Miss. 378, 110 So. 2d 351 (1959).

[20]2 Am. Jur. 2d *Administrative Law* § 662 (1962).

substantiality of evidence in a record without looking at the evidence on both sides, for evidence has significance only in context, not in the abstract.[21] Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence.[22]

III. Statutory Procedure for Judicial Review of the Mississippi State Oil and Gas Board

A. Review by Petition for Hearing and by Appeal

The Mississippi Legislature has enacted several statutes which provide judicial review for actions of the State Oil and Gas Board. The most useful of these statutes is section 6132-24 which gives the right of appeal from final rules and regulations or orders of the board and which reads in part as follows:

> In addition to other remedies now available, the state, or any interested person aggrieved by any final rule, regulation or order of the board, shall have the right, regardless of the amount involved, of appeal to the circuit court of the first judicial district of Hinds County, Mississippi, or to the circuit court of the county in which all or a part of appellant's property affected by such rule, regulation or order is situated, which shall be taken and perfected as hereinafter provided, within (30) days from the date of such final rule, regulation or order; and the said circuit court may affirm such rule, regulation or order, or reverse same for further proceedings as justice may require. . . .[23]

This section further provides that all appeals shall be heard and determined either in term time or in vacation on the record, including a transcript of pleadings and testimony, both oral and documentary, filed and heard before the board, and such appeal shall be heard and disposed of promptly by the court as a preference cause. In perfecting such an appeal the provisions of law respecting notice to the reporter and allowance of bills of exception respecting appeals from the circuit court to the supreme court are applicable, provided, however, that the reporter shall transcribe his notes and file the transcript of the record with the board within thirty days after approval of the appeal bond. The perfection of an appeal does not suspend the operation of any rule, regulation, or order of the board, but the judge of the circuit court to which the appeal is taken may award a writ of supersedeas to any rule, regulation, or order of the board after five days notice to the board and

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[21]Davis, Administrative Law Treatise § 29.02 (1958).

[22]Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 Harv. L. Rev. 704 (1943).

[23]Miss. Code Ann. § 6132-24 (Supp. 1964).

after hearing in which the circuit judge finds a great or irreparable damage would result to the appellant if he is denied relief. However, the stay is not effective until a supersedeas bond has been executed and filed with and approved by the clerk of the court or the circuit judge.[24]

The above section permits appeal to persons aggrieved by any "final rule, regulation or order of the Board." It is necessary to know exactly what constitutes a "final rule, regulation or order" in order to determine when this statute is available. An appeal under this section was denied in the case of *Proctor v. Hassie Hunt Trust*.[25] In this case Proctor appealed from an order of the State Oil and Gas Board which held that proceedings on a petition for integration be stayed and continued until a chancery suit between the parties involving questions of title had been finally decided by the supreme court. On appeal the circuit court dismissed the appeal. The Mississippi Supreme Court did the same for the reason that the order was not a "final order" within the meaning of section 6132-24 but was merely an order of continuance from which no appeal was permitted.

The question arises whether any final rule, regulation, or order within the contemplation of section 6132-24 is limited to such rules, regulations, or orders which are entered by the board subsequent to petition, notice, and hearing. If this section is so limited, and it apparently is, what methods are provided for judicial review of actions of the board without formal hearing such as issuance of drilling permits on units containing regular locations? In such situations section 6132-16 would be available because it provides that any interested persons shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter within the jurisdiction of the board by making a request therefor in writing. Such a hearing would result in an order from which an appeal could be taken to the circuit court under section 6132-24. Section 6132-16 further provides that upon receipt of such request the board shall promptly call a hearing thereon. After such hearing, with all convenient speed, and in any event within thirty days after the conclusion of such hearing, action shall be taken with regard to the subject matter thereof as it may deem appropriate.[26] However, this does not mean that the board must take action within thirty days after the hearing, for the purpose of the statute is to place upon the board a responsibility to act expeditiously, and the board may continue the matter until a subsequent meeting and render its order at that time.[27]

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[24]*Ibid.*

[25]215 Miss. 119, 60 So. 2d 558 (1952).

[26]Miss. Code Ann. § 6132-16 (Supp. 1964).

[27]Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d 85, *suggeestion of error overruled*, 214 Miss. 890, 59 So. 2d 844 (1952).

Judicial review is also available by injunction to the extent of determining whether any statute pertaining to the State Oil and Gas Board or any rule, regulation, or order made thereunder is without sanction of law, or that the provision of law, or the rule, regulation, or order complained of is invalid. Such an injunction against the board is provided for in section 6132-25 which reads as follows:

> (a) No temporary restraining order or injunction of any kind shall be granted against the board, or against any agent, employee or representative of said board restraining the board, or any of its agents, employees or representatives, from enforcing any statute of this state relating to conservation of oil and gas, or any of the provisions of this act, or any rule, regulation or order made thereunder, except after due notice to said board, and to all other defendants, and after a hearing at which it shall be clearly shown to the court that the act done or threatened is without sanction of law, or that the provision of law, or the rule, regulation or order complained of, is invalid, and that, if enforced against the complainant will cause an irreparable injury. With respect to any order or decree granting temporary injunctive relief, the nature and extent of the probable invalidity of the statute, or of any provision of this act, or of any rule, regulation or order thereunder involved in such suit, must be recited in the order or decree granting the temporary relief, as well as a clear statement of the probable damage relied upon by the court as justifying temporary injunctive relief.
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> (b) No temporary injunction, or temporary restraining order of any kind against the board, or its agents, employees or representatives, shall become effective until the complainant shall execute a bond in such amount and upon such conditions as the court may direct.[28]

A similar statute[29] authorizes injunctive relief whenever it appears that any person is violating or threatening to violate any statute of this state respecting the conservation of oil and gas or any provision, rule, regulation, or order thereunder. In this situation a suit for injunction may be brought against such person in the chancery court in the county of the residence of the defendant, or if there is more than one defendant in the county of residence of any defendant, or in the county where the violation is alleged to have occurred. Suit may be brought only after said person fails or refuses to cease such violation or threats of violation on notice to do so by the board or supervisor. In the event the board should fail to bring suit within ten days to enjoin any actual or threatened violation aforementioned, then any person or party in interest adversely affected by such violation, who has notified the board in writing of such violation, or threat thereof, and has requested the board to sue,

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[28]MISS. CODE ANN. § 6132-25 (Supp. 1964).

[29]MISS. CODE ANN. § 6132-26 (1952).

may, to prevent any or further violation, bring suit for that purpose in the chancery court of any county in which the board could have brought suit, and the board shall be made a party to such suit.

However, a court of equity will not issue an injunction under the provisions of the two above statutes unless there is no adequate remedy at law[30] and unless there is some element or factor, such as a threat of irreparable injury to the party seeking the injunction, which renders resort to equity necessary.[31]

Finally, section 6132-27[32] provides for appeals from any judgment of the circuit court or decree of any chancery court in any appeal proceeding brought under authority of the above described sections. Such appeal, when docketed in the supreme court, shall be placed on the preference docket of such court and may be advanced as such court may direct.

On appeal from a judgment sustaining the State Oil and Gas Board's order integrating all mineral interests in lands in certain gas drilling units, the supreme court has no power to adjudicate the effect of order on appellant's property rights by determining whether it implies or requires integration of their lands as other than unleased lands, where order adjudicated nothing as to title to lands or leases on such interest but will merely uphold order without considering incidental questions of title.[33]

In the case of *Superior Oil Company v. Griffith*,[34] the Mississippi Supreme Court pointed out that section 6132-24 of the Mississippi Code provides that on appeal to the circuit court from an order entered by the board the said circuit court may affirm such rule, regulation, or order, or reverse same for further proceedings as justice may require. The court then added that this is likewise the extent of its authority on appeal to it from such an order. Consequently it refused to modify the order of the board or to substitute a different integration order for that entered by the board on the ground that the entry of said order rests exclusively with the administrative agency.

Once a hearing has been given by the State Oil and Gas Board, the matters considered therein are not subject to collateral attack. This principle of law was set forth in *Frost v. Gulf Oil Corp.*[35] In this case

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[30]Madison County v. Mississippi State Highway Comm'n, 191 Miss. 192, 198 So. 284 (1940).

[31]Griffith, Mississippi Chancery Practice § 436 (2d ed. 1950).

[32]Miss. Code Ann. § 6132-27 (1952).

[33]Hutchins v. Humble Oil & Ref. Co., 59 So. 2d 103 (Miss. 1952).

[34]214 Miss. 891, 59 So. 2d 104, *suggestion of error sustained in part*, 214 Miss. 900, 60 So. 2d 505 (1952).

[35]238 Miss. 775, 119 So. 2d 759 (1960).

suit was brought in the Chancery Court of Jefferson Davis County to cancel an oil, gas, and mineral lease on the grounds that the complainants' mineral interest was not integrated into the producing gas unit. The Mississippi Supreme Court found that the State Oil and Gas Board, after a proper hearing, established the gas unit by order which adjudicated all things necessary for the establishment of said unit, and this was all that was necessary to integrate complainants' interest. The court held that where the board enters an order after due notice and hearing, that order cannot be collaterally attacked.

B. Review by Certiorari, Mandamus, and Prohibition

In addition to judicial review by appeal and injunction, actions of the Mississippi State Oil and Gas Board can be reviewed by the common law writs of certiorari, mandamus, and prohibition. These writs are provided for by statute. Each writ is unique in its availability and in its scope, but each in its way enables the issuing court a limited review of a board action.

1. *Certiorari*

The first of these is the writ of certiorari, one of the common law prerogative writs originally issuing only from the King to the judges or officers of an inferior court.[36] Certiorari is now provided by statute in Mississippi and is found in sections 1206 and 1207 of the Mississippi Code. Certiorari may be had to review the judgments of all tribunals inferior to the circuit court; "tribunals inferior to the circuit court" includes administrative agencies, such as the Railroad Commission (the predecessor of the present Public Service Commission).[37] The State Oil and Gas Board is no doubt an inferior tribunal within the contemplation of the statute. For certiorari to lie, the order or ruling of the administrative body must be judicial or quasi-judicial in nature and not merely an administrative order.[38] The review of the court granting certiorari is limited to an examination of questions of law arising or appearing on the face of the record and proceedings. The reviewing court cannot consider a transcript of the testimony before the board. This certainly limits the scope of review available.[39]

Section 1207 provides that review may be had of the judgments of all tribunals inferior to the circuit court, *whether an appeal be provided by law from the judgment sought to be reviewed or not.* The statute appears to make review by certiorari available even though an appeal

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[36]Duggen v. McGruder, 1 Miss. (1 Walker) 112 (1822).

[37]Gulf & S. I. R.R. v. Adams, 85 Miss. 772, 38 So. 348 (1905).

[38]Board of Supervisors v. Melton, 123 Miss. 615, 86 So. 369 (1920).

[39]*E.g.*, Federal Credit Co. v. Zepernick Grocery Co., 153 Miss. 489, 120 So. 173 (1929).

is provided by law, but the Mississippi Supreme Court has repeatedly held that the writ of certiorari will not issue in those cases in which there is a plain, speedy, and adequate remedy by appeal.[40] This principle is no more than an application of the elementary rule of procedure that an extraordinary remedy will not be allowed when an ordinary remedy is, or has been, fully available.

It is interesting to note that the statute which provides for appeals from the Mississippi State Oil and Gas Board states that said appeal is "in addition to other remedies now available."[41] It would seem that it was the intention of the legislature to provide appeal in addition to other remedies such as writ of certiorari in lieu of the non-statutory remedies. However, the Mississippi Court was confronted with an almost identical statute in *Mississippi Valley Gas Co. v. City of Jackson*,[42] and it held that the extraordinary writ of certiorari is unavailable where a statutory method of appeal is available which is adequate, speedy, and complete. The statute under consideration in that case was section 7716-26 of the Mississippi Code which reads:

> In addition to other remedies now available at law or in equity any party aggrieved by any final order, finding, or judgment of the commission [Public Service Commission], shall have the right, regardless of the amount involved, of appeal . . . .[43]

This section has a provision requiring appeals to be made within thirty days of the commission's order which is very similar to the period within which appeals must be taken from the State Oil and Gas Board. The court discussed the phrase "in addition to other remedies now available" and then held that this phrase refers only to remedies which would be available where the statutory method of appeal is not adequate, speedy, and complete.[44] Since the court considered the appeal statute for the Mississippi Public Service Commission (section 7716-26) to be adequate, speedy, and complete, it held that a writ of certiorari should not be issued. The same results should apply to decisions of the State Oil and Gas Board since the applicable appeal statute resembles the appeal statute considered by the court in the *Mississippi Valley Gas Co.* case.

2. *Mandamus*

The writ of mandamus is another of the prerogative writs with a narrow and well defined purpose at common law. It issues from a court

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[40]*Ibid.*

[41]Miss. Code Ann. § 6132-24 (Supp. 1964).

[42]236 Miss. 81, 109 So. 2d 637 (1959).

[43]Miss. Code Ann. § 7716-26 (1956).

[44]Mississippi Valley Gas Co. v. City of Jackson, 236 Miss. 81, 94, 109 So. 2d 637, 642 (1959).

to compel performance of what are known as "ministerial duties."[45] Sections 1109 through 1118 of the Mississippi Code set forth the remedy by way of mandamus. Section 1109 reads as follows:

> On the petition of the state, by its attorney-general or a district attorney, in any matter affecting the public interest, or on the petition of any private person who is interested, the writ of mandamus shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or admission of which the law specially enjoins as a duty resulting from an office, trust, or station, where there is not a plain, adequate, and speedy remedy in the ordinary course of law.[46]

Mandamus is an extraordinary writ, and may not be resorted to where the purpose may be otherwise reasonably accomplished,[47] and the writ will not be issued wherever the public interest will be adversely affected.[48] Mandamus is the proper remedy to compel any inferior tribunal, corporation, board, officer, or other person to do or not to do an act, the performance or omission of which the law specifically enjoins as his duty resulting from such office, trust, or station.[49] Where discretion is left to the inferior tribunal involved, a writ of mandamus can only compel such tribunal to act and cannot control its discretion.[50]

3. *Prohibition*

The writ of prohibition is still another of the ancient prerogative writs. This writ, like the two preceding prerogative writs has also been provided by statute.[51] This writ issues from a superior court for the purpose of preserving the jurisdictional boundaries of the lower tribunals.[52] The writ is commonly defined as one to prevent a tribunal possessing judicial or quasi-judicial powers from exercising jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance.[53] Apparently an administrative agency such as the State Oil and Gas Board would be subject to the writ of prohibition insofar as it pertains to actions which are judicial

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[45]Kidder, *The Methods and Nature of Judicial Review of Orders of the Oil and Gas Division of the Railroad Commission*, 33 TEXAS L. REV. 680 (1955).

[46]MISS. CODE ANN. § 1109 (1956).

[47]McHenry v. State, 91 Miss. 562, 44 So. 831 (1907).

[48]Wood v. State, 169 Miss. 790, 142 So. 747 (1932).

[49]Jacobs v. Bodie, 208 Miss. 779, 45 So. 2d 587 (1950).

[50]City of Greenwood v. Provine, 143 Miss. 42, 108 So. 284 (1926).

[51]MISS. CODE ANN. § 1119 (1956).

[52]Barnes v. McLeod, 165 Miss. 437, 140 So. 740 (1932).

[53]Barnes v. Ladner, 241 Miss. 606, 131 So. 2d 458 (1961).

or quasi-judicial, but actions of the Board which are legislative or ministerial are not subject to this writ.[54]

A writ of prohibition is an extraordinary writ and is properly issued only in cases of extreme necessity. It should appear to the judge issuing the writ that it is the only adequate remedy of the party making the application therefor. It will not lie in a case which may be redressed in the ordinary course of judicial proceeding, and it is not to be made a substitute for any other method of obtaining the relief sought. If a complete remedy lies by appeal, certiorari, mandamus, or in any other manner, this writ should be denied. It is different from an injunction, in that the injunction is addressed to the litigating parties, while a writ of prohibition is addressed to the inferior court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim. The adequacy of the remedy by appeal, or in the ordinary course of law, is a true test in all cases, and not the mere question of an action in excess of jurisdiction. Whenever there is anything in the nature of the action or proceeding that makes it apparent that the rights of a partly litigant cannot be adequately protected by any other remedy than through the exercise of this extraordinary jurisdiction, it is not only proper to grant the writ of prohibition but it should be granted.[55]

C. Doctrine of Exhaustion of Administrative Remedies

One of the new rules growing out of administrative law is that known as exhaustion of administrative remedies. This doctrine requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. This doctrine is well established as a cardinal principle of practically universal application and must be borne in mind by the courts in construing a statute providing for review of administrative action.[56] Because the doctrine of exhaustion of administrative remedies is one of judicial administration, it is applicable to proceedings at law, as well as suits in equity and applies in mandamus and certiorari proceedings.[57] These principles were recognized by the Mississippi court in *Powe v. Forrest County Election Comm'n.*[58]

The principal reason for requiring exhaustion of administrative remedies is that the administrative agency such as the State Oil and Gas Board has superior knowledge of the technical issues involved, and

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[54] 42 Am. Jur. *Prohibition* § 14 (1942).

[55] Crittenden v. Town of Booneville, 92 Miss. 277, 45 So. 723 (1908).

[56] 2 Am. Jur. 2d *Administrative Law* § 595 (1962).

[57] *Id.* § 599, at 434.

[58] 163 So. 2d 656 (Miss. 1964).

procedure before the board is more efficient.[59] This was probably the reason the Mississippi Legislature required that appeals to the circuit court be taken only from "final" rules, regulations, and orders of the board.[60] This imposes upon a party seeking review of a board action by the circuit court the necessity of exhausting his administrative remedies, such as petition to the board for a hearing,[61] before he has access to said court.

D. Review Provided by Unitization Statute

The 1964 session of the Mississippi Legislature enacted a statute providing for compulsory unitization of entire fields or pools within a field after a hearing and order by the State Oil and Gas Board.[62] Section 10 of this act specifically provides for court review of unitization orders rendered by the board by appeal to chancery court with trial de novo:

> Any interested person adversely affected by any provision of this act or by any rule, regulation or order made by the State Oil and Gas Board hereunder, or by any act done or threatened thereunder, may obtain court review and seek relief by appeal, which appeal shall be to the chancery court of the county wherein the land involved, or any part thereof, is situated. . . . Any interested party may appeal to the chancery court of the county wherein the land involved or any part thereof is situated, if appeal be demanded within (30) days after rendition of the order of the board . . . .
>
> Such suit shall be given a preferential setting and shall be tried anew and disposed of as any ordinary civil suit and not upon the record of any hearing or hearings before the board, if any be held, and the court shall consider all competent evidence introduced and shall decide the case upon such evidence and the law applicable thereto, and no rule, regulation, order or decision involved in such suit entered by the board shall be binding on the court, though supported by evidence introduced at a hearing or hearings before the board.[63]

This statute will probably be declared unconstitutional insofar as it provides for a de novo hearing by the chancery court of appeal. In *California Co. v. State Oil & Gas Bd.*[64] the Mississippi Supreme Court indicated that a statute permitting appeal to the circuit court from

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[59]DAVIS, ADMINISTRATIVE LAW § 182, at 615 (1951).

[60]MISS. CODE ANN. § 6132-24 (Supp. 1964).

[61]MISS. CODE ANN. § 6132-16 (Supp. 1964).

[62]MISS. CODE ANN. §§ 6132-101-12 (Supp. 1964).

[63]MISS. CODE ANN. § 6132-110 (Supp. 1964).

[64]200 Miss. 824, 27 So. 2d 542, *suggestion of error overruled,* 200 Miss. 825, 28 So. 2d 120 (1946).

the State Oil and Gas Board and a trial de novo at said court was unconstitutional for it permitted said judicial court to act in a legislative or administrative capacity.

IV. Conclusion

The 1948 act of the Mississippi Legislature establishing the present State Oil and Gas Board provides for complete and speedy review of board actions by petition for hearing, injunctions, and appeals. It is well settled that the circuit court reviewing a final rule, regulation, or order of the board on appeal is limited to a determination of whether or not the decision of the board is supported by substantial evidence, is arbitrary or capricious, is beyond the power of the board to make, or violates some constitutional right of the complaining party. The writs of mandamus, certiorari, and prohibition may be used to review an action of the board to the unique extent allowed by each of these writs. However, the writs will not be issued when a complete, speedy, and adequate remedy is available at law, and since the petition for hearing and the appeal provided by statute would in most instances constitute such a remedy, it would seem that only in an unusual situation would these writs be available for review.

State Bar Section

WHAT THE REFEREE EXPECTS AT THE HEARING†

I. Introduction

Since what may actually be expected at a hearing will vary considerably, depending on the type of case to be heard, and, more especially, on counsel representing the respective parties, I will attempt to outline what I consider should be expected at an ideal hearing.

By way of background, many of you will recall that for several years after the enactment of the Mississippi Workmen's Compensation Act, a cause was controverted generally by the claimant stating on a form provided by the commission that a demand was being made for compensation to which he was entitled. It was common practice of counsel for many years to stoutly resist any enlargement upon this statement. The defendant usually responded by denying that the claimant was entitled to any compensation; thereby arriving at an issue so as to commence the case. At some point during the course of the hearing, usually after both parties had rested, the attorney referee was able, by a process of elimination, to get a rough idea of what was actually at issue. Since the adoption by the commission, on recommendation of the Bar Association, of the Commission Forms B 5-11 and B 5-22, the issue or issues to be resolved in a workmen's compensation hearing normally are narrowed considerably so that one or two primary points are clearly at issue.

During the last several months, I would estimate that some 33⅓ per cent to 50 per cent of the hearings that we conducted were for determination of the nature and the extent of disability and the contribution to such disability of a prior existing disease, handicap, or lesion. So far as I am concerned, and I feel sure that this is the sentiment of all the referees with the commission, and of the commission itself, the workload of the commission would long since have snowballed to the point where three or four times as many referees would have been necessary had not these forms for controverting and response been adopted. I further would offer my thanks, and the thanks of the commission and its other referees, to the attorneys for having voluntarily lightened the workload by stipulations and other time-saving procedures.

It is my purpose to offer suggestions whereby the able, conscientious attorney for either the claimant or the defendant may conserve both his

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†Address delivered at the Mississippi Workmen's Compensation Seminar, University of Mississippi, February 26, 1965.

Royce L. White, Attorney Referee, Clinton, Mississippi.

time and effort and the time and effort of the representatives of the commission to the end that timely justice may be accomplished.

II. Pre-Hearing

At the time of the filing of the B 5-11 or B 5-22, counsel should make every effort to ascertain the physicians as required by the rules of the commission. Quite frequently, when this is done by the parties, counsel are able to settle the claim without the necessity of a hearing.

Frequently, a proper investigation of a claim prior to the filing of the motion to controvert will reveal that a hearing should be held in some county other than the county wherein the accident occurred. The law requires that the commission set the hearing in the county where the accident occurred, but the hearing may be held in some other county by agreement of the parties. If, therefore, request is made at the time of filing of the motion to controvert that the hearing be held in some other county, it will save the commission from having to postpone and reset the case at the desired place of hearing after the case has already been set, all of which may require three to five months and considerable unnecessary correspondence. For example, cases are usually scheduled for a full week in a particular area. Thus, if a case was set to be heard in Tupelo, Mississippi, and it was found that the hearing actually should be conducted in Kosciusko, Mississippi, then due to the required time for travel, it would be necessary that the case be continued and set at a later date when the referee would be in the area of Kosciusko.

A good percentage of the cases which are controverted are defended through the use of an affirmative defense, such as one of the statutes of limitation or want of jurisdiction. When such affirmative defense is alleged, the initial hearing may be limited to proof relating to this defense. Therefore, the attorney referee generally will be guided in conducting the hearing by the suggestions of counsel in this regard.

The commission rules require that requests for subpoena be made at a reasonable time prior to the date set for the hearing of the claim, and it is the general rule that such requests be made in writing at least five days prior to the hearing date. However, we frequently reach the hearing and are requested by counsel to issue subpoena instanter, which we usually will do but cannot be depended upon to do. More and more frequently, motions for subpoena duces tecum are being received, and as a matter of practice these motions are usually sustained, and the subpoena issued on the theory that it is better to have the desired records available at the proper time and place even though a motion to quash the subpoena may be sustained at the hearing of said motion. This is a practice primarily necessitated by the fact that the attorney referees are away from the commission's offices a majority of the time

and cannot, therefore, go into the merits of the motion even superficially in time to take effective action prior to the hearing.

There are a variety of other collateral motions that are filed with the commission from time to time, and disposition of these motions is usually made either at the outset of the hearing or at some time during the course of the hearing. One such motion is the motion for further medical examination. There is considerable doubt as to the authority of the commission to order any such examination except as provided in section 7 of the act: "Whenever in the opinion of the commission a physician has not correctly estimated the degree of permanent disability or the extent of temporary disability of an injured employee, the commission shall have the power to cause such employee to be examined by a physician selected by the commission and to obtain from such physician a report containing his estimate of such disabilities." Since from the wording of this portion of the act it would appear that the physician or physicians should have already testified prior to the mentioned determination, it is doubtful that the examination should be allowed until the parties have rested. For that reason the referee is usually very hesitant to order such an examination.

We find that quite frequently on the date established for a hearing the courtroom may be in use by one of the several courts or by one of the several governmental bureaus or agencies. I can assure you that all referees greatly appreciate the efforts of counsel in obtaining a suitable place to conduct the hearing when this situation exists. For your information we normally require a table around which some five to seven people may be seated; we prefer air-conditioned rooms in the summer and well heated rooms in the winter.

The commission assumes that one hearing will be sufficient for the introduction of all proof desired by the parties. The exceptions to this rule far outnumber the adherences to the rule; however, we do believe that the best interests of all parties would be served if it is made known through consultation and correspondence the probable length of time that will be required for a hearing. We generally will grant, for reason, one continuance and one recess of hearing to either party. However, we would prefer to discourage the practice of simply assuming that two or three hearings will be conducted in each cause.

III. Hearing

At the hearing of the cause, if the attorneys have properly prepared, and this I cannot stress too much, the actual making of the record should be, and is ordinarily, very simple, and should be very brief. Recently the practice has developed that more expert testimony is taken by deposition than by actual appearance. This is encouraged by the com-

mission since depositions are more convenient to both the expert and to counsel for the parties than actual appearances by experts. In addition, since no record is available to the referee at the time he writes his order, he is greatly assisted by the deposition since it contains the full testimony of the expert and is, therefore, much superior to the meager notes that the referee can make, between rulings on objections, while the physician or expert is testifying.

We are also seeing more use of interrogatories, especially as concerns lay witnesses who are employed in positions requiring them to travel or those in highly skilled positions whose presence is essential to the operation of their employer's business. As previously stated, the issues are narrowed considerably prior to the hearing, and they may be further narrowed at the beginning of the hearing by the production of wage records, hospital reports, medical reports, and other documentary evidence.

It is seriously suggested that in many workmen's compensation cases a simple trial brief is well worth the time and work required in its preparation. All lawyers are concerned in the trial of every type law suit with the method of proof. Since the referees usually adhere fairly well to the rules regarding hearsay testimony, the best evidence rule, and other similar rules of evidence applicable in any other law suit, counsel should be prepared to assist the referee on close questions of admissibility. At this point I will state to you that my pet peeve is the instance when an attorney waits until a ruling is made and then attempts to argue the ruling. I greatly appreciate, as previously stated, any assistance from either attorney in reaching a proper ruling, but I believe that counsel should announce that they desire to be heard on the matter prior to a ruling. I frequently am reminded that the rules of evidence are relaxed so as to permit the introduction of any relevant and material evidence which will throw light on the matter in controversy, and I believe that this is a wholesome approach to the type of hearing that we are required to conduct. It should be remembered, however, that "relaxed" does not mean "abolished." Of course, the law itself makes one specific exception to the hearsay rule wherein it states that a declaration of a deceased employee concerning the injury in respect of which the hearing is being conducted shall be received into evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

It has long been my practice, when counsel for either party expressed the opinion that I was incorrect in a ruling, to permit a document sought to be admitted to be marked as an exhibit for identification so that any reviewing court might correct my error and have the benefit of the document in question. I also have uniformly permitted counsel to

make a brief statement concerning the matter to which a witness would testify, if permitted, when I have sustained an objection to his testimony; and I believe that this is practiced by all of the referees with the commission. We frequently are asked to admit narrative reports of physicians, but, so far as I know, the commission has uniformly held that such reports are not admissible over objection except as exhibits to the testimony of the person who made the narrative report.

On the other hand, the form reports such as the B-3, B-9, and B-11 which are required to be filed by the commission are usually admitted so long as the material therein does not go beyond the scope of the report. We normally do not permit the leading of the witness except in those instances wherein the witness is obviously hostile, immature, or otherwise deficient, or when the witness is an adverse witness or on cross-examination.

It has been my observation that a great many unnecessary documents are offered in evidence, such as, medical bills, voluminous hospital records, x-ray pictures, and the like. I greatly prefer the interpretation by the expert witness of x-ray pictures, because, quite frankly, I am unable to interpret x-rays myself with any degree of accuracy. Medical bills are almost always uselessly burdensome to the record since if a claim is compensable, the medical expenses are ordered paid as a matter of course, at which time the bills may be submitted to the defendants. Hospital records may sometimes be necessarily a part of the record. However, in these instances, the attorneys for the parties should select from the hospital records only those absolutely necessary and pertinent in the cause. By way of suggestion in regard to hospital records and x-ray pictures, we frequently see these documents entered as exhibits in order that a physician can be interrogated concerning them at a later time and then prior to the completion of hearing these documents are withdrawn since their use has been served.

In further reference to frequently noted unnecessary proof, I would mention that in only one instance is it necessary that the dependency of a relative of the claimant be shown, that being where the claim is for death benefits. Another frequent occurrence of unnecessary proof is the attempt to show negligence on the part of the defendant. On one occasion recently I arrived at the place of hearing and found that twenty witnesses were present to testify. All of them were administered the oath. However, after the third witness, whose testimony was cumulative, it was decided that the other seventeen might be excused.

Normally the referee does not have the time nor the inclination to hear arguments of counsel at the conclusion of the hearing relating to the merits of the cause. If it is desired by counsel, memorandum briefs are accepted. These briefs usually are prepared in letter form and are

often very helpful to the referee, especially when a matter has been in the process of trial for several months.

The payment of witness fees is generally governed by the provisions of statutes relating to the payment of fees for circuit or chancery court appearances. Where counsel desire that the commission pay such fees, it is necessary that the commission be furnished with the name, address, and travel mileage of the several witnesses who appear under a subpoena issued by the commission.

IV. Conclusion

In conclusion, I would like to make one observation in a spirit of assistance to all concerned. I have found that the attorney who has prepared for the hearing of his claim or the defense of a claim in such manner that it can be presented with the absolute minimum of testimony will usually be the more successful. I have seen many occasions when an attorney has asked that one question too many.

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STUDENT COMMENTS

AN EXAMINATION OF VARIOUS ASPECTS OF MISSISSIPPI WILLS LAW

I. Introduction

The purpose of this article is to treat various aspects of the Mississippi law of wills. Subjects that are dealt with include testamentary capacity and undue influence, the requirements for the proper execution of wills, holographic instruments, revocation of testamentary dispositions, the right of a surviving spouse to elect against the testament, and the effect of a direction in a will that all debts of the testator be paid. There is statutory law dealing with these topics, except for the last-named one. An attempt will be made to survey the cases construing these statutes and to reach a conclusion in regard to the effect of a clause directing that all debts be paid.

II. Testamentary Capacity

A. Mental Competence

1. *General*

It is provided by statute[1] in Mississippi that any person who is twenty-one years of age or older is capable of disposing of his property by will, provided that he or she is of "sound and disposing mind." The common law testamentary disability of married women has thus been abolished. A person of sound mind can execute a will from any motive which is satisfactory to him, whether out of "love, affection, gratitude, partiality, prejudice, or even a whim or caprice."[2] With reference to the requirements for testamentary capacity, the Mississippi court has affirmed on numerous occasions that a testator is competent to execute a will if he understands and appreciates the nature of his act, the natural objects of his bounty and their relation to him, and is capable of making a disposition of his property in accordance with some plan based on reasoning.[3] The last listed qualification presupposes the ability of the testator to comprehend the nature and extent of his property. One might be unable to transact business and manage his own estate, justifying the appointment of a guardian, and yet possess the capacity required to execute a will.[4]

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[1]Miss. Code Ann. § 657 (1956).

[2]*E.g.*, Gathing v. Howard, 122 Miss. 355, 383, 84 So. 240, 246 (1920).

[3]*E.g.*, Fortenberr y v.Herrington, 188 Miss. 735, 196 So. 232 (1940).

[4]Nebhan v. Mansour, 162 Miss. 418, 430, 139 So. 166, 168 (1932).

2. *Time of Determination*

Testamentary capacity is determinable as of the date of the execution of the will.[5] Incapacity is not proved by showing that the testator was incompetent during some period before or some period after the execution,[6] as a person who at times is mentally incompetent to execute a will may effect a valid will during a lucid interval.[7] The existence of temporary or intermittent periods of mental incapacity prior to the execution of the will does not raise a presumption that the incapacity continued until the time of execution.[8] But the statements of the testator, made before, after, or at the time of executing the will, are competent as evidence to prove testamentary incapacity.[9]

3. *Factors in Determining Capacity*

The proponents of a will, the provisions of which are unreasonable and inconsistent with the duties of the testator to his property and family, must give some reasonable explanation of its unnatural character.[10] But although the unreasonableness is an element to be considered upon the question of undue influence and incapacity, an unnatural disposition of property, standing alone, will not avoid a will, for it must be upheld, no matter how unreasonable, if the testator was competent.[11] The nature and extent of the estate disposed of is a factor to be given weight in determining testamentary capacity, for a person might be able to understand and appreciate the extent of his property in one instance, while one with equal capacity might not be able to comprehend a more complex estate.[12] An adjudication of insanity is not conclusive, whether made before or after the execution of a will.[13] One reason is that a person may be so mentally deficient that he lacks testamentary capacity and yet not be insane within the usage of that term.[14] And it is equally true, as has been stated, that one afflicted with insanity can have capacity to make a will during a lucid interval.[15]

An unfounded prejudice or even hatred toward a near relative is not enough to destroy testamentary capacity unless it amounts to an insane

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[5]*E.g.*, Kelker v. Jordan, 228 Miss. 847, 89 So. 2d 858 (1956).

[6]*E.g.*, Lum v. Lasch, 93 Miss. 81, 46 So. 559 (1908).

[7]*E.g.*, Gholson v. Peters, 180 Miss. 256, 176 So. 605 (1937).

[8]Scally v. Wardlaw, 123 Miss. 857, 86 So. 625 (1920).

[9]*E.g.*, Sheehan v. Kearney, 82 Miss. 688, 692, 21 So. 41, 42 (1896).

[10]*E.g.*, Jamison v. Jamison, 96 Miss. 288, 51 So. 130 (1910).

[11]*E.g.*, Scally v. Wardlaw, 123 Miss. 857, 878-79, 86 So. 625, 627 (1920).

[12]See Norman v. Norman, 196 Miss. 597, 18 So. 2d 130 (1944).

[13]Nebhan v. Mansour, 162 Miss. 418, 139 So. 166 (1932).

[14]See Smith v. Smith, 185 Miss. 702, 717, 188 So. 305, 308 (1939).

[15]*E.g.*, Gholson v. Peters, 180 Miss. 256, 176 So. 605 (1937).

delusion.[16] An insane delusion has been defined as a false belief that is the product of a diseased mind and to which one adheres contrary to evidence and reason.[17] To destroy capacity to execute a will, the delusion must be the dominating factor in the testamentary act.[18] It must be remembered that it is not necessary that the incapacity of the testator be proven beyond all reasonable doubt but rather by a preponderance of the evidence.[19]

4. *Competent Witnesses on Capacity*

With respect to who may be allowed to testify on the issue of testamentary capacity, one who was a witness to the execution of the will may express an opinion as an expert.[20] The explanation for the fact that the testimony of an attesting witness is given more weight than that of others is that he is under a duty to satisfy himself that the testator is competent and for the obvious reason that he was present at the time at which capacity is determinable.[21] One who is not an expert and was not an attesting witness may testify as to his opinion on testamentary capacity only after describing the conduct of the testator and the circumstances involved upon which his opinion is based.[22] If the attorney who drew the will had consulted with the testator when no other person was present, he will not be permitted to testify on the question of testamentary capacity concerning the actions and declarations of the testator during the discussion, since such communications are confidential and privileged.[23] But an attorney can so testify where the consultation was not confidential, *i.e.*, it occurred in the presence of another person.[24] An attending physician is barred under the privileged communications rule from testifying to anything that he learned from the patient by virtue of the relationship of patient and physician.[25] But he may testify on the issue of competency from knowledge, relating to the condition of the testator, obtained socially and disconnected from professional visits.[26]

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[16]*Ibid.*

[17]ATKINSON, WILLS, 242 (2d ed. 1953).

[18]Gholson v. Peters, 180 Miss. 256, 176 So. 605 (1937).

[19]King v. Rowan, 82 Miss. 1, 34 So. 325 (1903).

[20]Fortenberry v. Herrington, 188 Miss. 735, 747, 196 So. 232, 236 (1940).

[21]*Ibid.*

[22]*E.g.*, Ward v. Ward, 124 Miss. 697, 708, 87 So. 153, 155 (1921).

[23]*E.g.*, Nebhan v. Mansour, 162 Miss. 418, 428, 139 So. 166, 167 (1932).

[24]*Ibid.*

[25]*E.g.*, Watkins v. Watkins, 142 Miss. 210, 238-39, 106 So. 753, 758-59 (1926).

[26]*Id.* at 239, 106 So. at 759.

B. Undue Influence

1. *General*

The word "undue" in the term "undue influence" denotes something wrong and illegal, for to induce one to do that which he ought to do cannot be condemned by the law.[27] Only where the provisions of a will materially injure someone or are intrinsically unfair to him will influence on the testator be considered undue.[28] A will which is the product of undue influence is no will,[29] for undue influence destroys testamentary capacity.[30] It has been declared by the Mississippi court that undue influence exists when the will of the testator is so dominated and controlled that it becomes the will of another person,[31] when the free agency of the testator is overcome,[32] and more eloquently, where the will "was spawned by, and was the handiwork of others, who dominated the decedent's thinking."[33] Influence exerted by means of "advice, arguments, persuasions, solicitation, suggestion, or entreaty" is not undue unless it is so persistent that it subordinates the will of the testator.[34] Neither is influence ordinarily regarded as undue which arises out of "sympathy, kindness, attention, attachment or affection, gratitude for past services, desire of gratifying the wishes of another or of relieving distress, claims of kindred and family or other intimate personal relations, love, esteem, social relations, prejudices, or flattery."[35] It is therefore clear that every kind of influence that one may have on another is not undue influence.

The existence of undue influence must usually be determined from the facts and circumstances of the particular case, since it is not often exercised openly in the presence of others.[36] Since the evidence must necessarily be circumstantial, the only positive and affirmative proof that is necessary is of facts and circumstances from which the undue influence can be inferred.[37] Because undue influence is by its nature a consequence of accumulating forces, what happened at the time of the execution of the will is generally not controlling.[38]

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[27]Morris v. Morris, 192 Miss. 518, 521, 6 So. 2d 311, 312 (1942).

[28]Gathings v. Howard, 122 Miss. 355, 384, 84 So. 240, 246 (1920).

[29]Woodville v. Pizzati, 119 Miss. 442, 464, 81 So. 127, 132 (1919).

[30]Meek v. Perry, 36 Miss. (7 George) 190, 244 (1858).

[31]Sanders v. Sanders, 126 Miss. 610, 627, 89 So. 261, 264 (1921).

[32]Isom v. Canedy, 128 Miss. 64, 75, 88 So. 485, 489 (1921).

[33]Young v. Martin, 239 Miss. 861, 872, 125 So. 2d 734, 739 (1960).

[34]Scally v. Wardlaw, 123 Miss. 857, 881, 86 So. 625, 628 (1920).

[35]Gillis v. Smith, 114 Miss. 665, 677, 75 So. 451, 453 (1917).

[36]*E.g.*, Young v. Martin, 239 Miss. 861, 870, 125 So. 2d 734, 738 (1960).

[37]Jamison v. Jamison, 96 Miss. 288, 51 So. 130 (1910).

[38]Halford v. Hines, 223 Miss. 786, 796-97, 79 So. 2d 264, 268 (1955).

2. *Effect of Confidential Relationship*

Where a confidential relationship exists between a testator and the beneficiary under his will, and the beneficiary has been actively concerned in the preparation or execution of the will, a presumption arises that the beneficiary has exercised undue influence over the testator.[39] The burden of rebutting this presumption is cast upon the beneficiary, who must show by clear and convincing evidence that the testator fully deliberated over the matter and that he (the beneficiary) acted entirely in good faith, *i.e.*, that he took no advantage of his superior knowledge or of his influence over the testator.[40] In one case, involving a deed rather than a will, it was stated that the presumption of invalidity "can be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action."[41] The court further asserted that the only means by which independent consent and advice can be clearly proven is by showing that the grantor acted on the advice of a competent person, who was not connected with the grantee and who was devoted completely to the interest of the grantor.[42] In that case the attorney who prepared the deed was the attorney both for the grantor and for the grantee.

Although, generally speaking, the same rules for testing capacity apply to both wills and deeds,[43] there is one distinguishable difference. With respect to deeds, undue influence will be presumed merely from the proving of the existence of a confidential relationship between the donee and the donor.[44] In regard to wills, an active participation in the preparation or execution of the instrument is essential in order for the presumption to arise.[45] Therefore, if in the case of *Ham v. Ham*[46] there had been involved a will rather than a deed, there would have been no presumption of invalidity unless the beneficiary had taken an active role in the preparation or execution of the will. But it is submitted that, had he taken an active role, he would have had to show that the testator had made his own decision and had relied upon the advice of one who was interested in his welfare and who was not allied with the beneficiary.

3. *Existence of Confidential Relationships*

There is a fiduciary relationship when confidence is reposed in one,

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[39]Croft v. Adler, 237 Miss. 713, 723, 115 So. 2d 683, 688 (1959).

[40]*Ibid.*

[41]Ham v. Ham, 146 Miss. 161, 173, 110 So. 583, 584 (1926).

[42]*Id.* at 174, 110 So. at 585.

[43]*E.g.*, Young v. Martin, 239 Miss. 861, 871, 125 So. 2d 734, 738 (1960).

[44]Croft v. Adler, 237 Miss. 713, 723, 115 So. 2d 683, 687-88 (1959).

[45]*Id.* at 723-24, 115 So. 2d at 688.

[46]146 Miss. 161, 110 So. 583 (1926).

and dominant influence, naturally growing out of such confidence, is exercised by him.[47] The landmark case in Mississippi concerning this question is *Meek v. Perry*.[48] There the will of a ward giving all or nearly all of her property to her guardian was held to be prima facie void. The court determined that undue influence would be presumed where there was a known confidential relationship, and that the guardian bore the burden of proving that the ward's act was a consequence of the exercise of her own volition.[49] The court reached a similar conclusion where the relationship was that of physician and patient and the doctor was the beneficiary under the will.[50] Other conventional confidential relationships to which the principle would be applied are those of attorney and client,[51] trustee and beneficiary,[52] religious and spiritual advisor,[53] employer and employee,[54] landlord and tenant,[55] and close business relations,[56] such as partners, principal and agent, and confidential business managers. However, a divided court decided that where the testator and beneficiary had been engaged to be married for ten years prior to the execution of the will, no presumption of undue influence arose from the relationship itself.[57] The able dissent submitted that a close personal and confidential relationship was shown to have existed.[58] Ties of blood accompanied by affection are not necessarily enough to create a confidential relationship,[59] nor does such a relationship necessarily arise from the relationship of parent and child.[60] Indeed, in cases where there is no conventional confidential relationship, whether or not a confidential relationship will be found to exist will depend upon the facts and circumstances of each particular case.[61] If from the facts there is found to be such a relationship, the same principle that applies to the conventional fiduciary relations will apply.[62] The burden of

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[47]*E.g.*, Wofford v. Wofford, 244 Miss. 442, 456, 124 So. 2d 188, 194 (1962).

[48]36 Miss. (7 George) 190 (1858).

[49]*Ibid.*

[50]Hitt v. Terry, 92 Miss. 671, 46 So. 829 (1908).

[51]See Hitt v. Terry, 92 Miss. 671, 710, 46 So. 829, 840 (1908).

[52]See Meek v. Perry, 36 Miss. (7 George) 190, 245 (1858).

[53]See Barber v. McClure, 165 So. 2d 156, 160 (Miss. 1964).

[54]*Ibid.*

[55]*Ibid.*

[56]*Ibid.*

[57]O'Bannon v. Henrich, 191 Miss. 815, 4 So. 2d 208 (1941).

[58]*Id.* at 824, 4 So. 2d at 212 (dissenting opinion).

[59]Cresswell v. Cresswell, 164 Miss. 871, 144 So. 41 (1932).

[60]Olmstead v. Olmstead, 233 Miss. 621, 103 So. 2d 399 (1958).

[61]Barber v. McClure, 165 So. 2d 156, 160 (Miss. 1964).

[62]*E.g.*, Ham v. Ham, 146 Miss. 161, 110 So. 583 (1926).

proving the fiduciary relationship will of course lie upon the party asserting its existence.[63]

4. *Factors in Determining Undue Influence*

The mental and physical condition of the testator are factors to be taken into consideration upon the question of undue influence, for if one is in a helpless condition physically, his will power and mental balance are necessarily affected, thus rendering him more susceptible to undue influence.[64] What has been said with respect to mental incapacity, regarding a will containing unreasonable and unnatural provisions, applies equally to such cases where undue influence is the issue.[65] Also, the declarations of the testator, made before, after, or simultaneous with the execution of the will, are relevant in proving undue influence, for such statements show his state of mind and are helpful in determining whether he was susceptible of being unduly influenced.[66] Declarations made at or about the time of the execution of the will are admissible as evidence of the truth of such statements,[67] but declarations not made at or about the time of the execution of the will are not admissible to prove the truth of the facts therein declared.[68]

5. *Burden of Proof*

In a proceeding to determine the validity of a will, the "issue is single—will or no will."[69] The burden of proof, both as to showing the presence of testamentary capacity and the absence of undue influence, is on the proponent of the will throughout the trial of the contest.[70] The existence of the legal presumption that everyone is of sound mind in the absence of evidence to the contrary does not relieve the proponent of proving testamentary capacity.[71] But he makes out a prima facie case by introducing the will and the record of the probated will.[72] It is emphasized that, although the proponent has established a prima facie case, he has not relieved himself of the burden of proof. A presumption of testamentary capacity having been thereby raised, the contestant

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[63]*E.g.*, Ward v. Ward, 177 Miss. 743, 171 So. 675 (1937).

[64]See Hitt v. Terry, 92 Miss. 671, 698-99, 46 So. 829, 835 (1908).

[65]*E.g.*, Scally v. Wardlaw, 123 Miss. 857, 878-79, 86 So. 625, 627 (1920).

[66]Sanders v. Sanders, 126 Miss. 610, 624, 89 So. 261, 263-64 (1921).

[67]*Id.* at 628, 89 So. at 264.

[68]*Id.* at 625, 89 So. at 263.

[69]Sheehan v. Kearney, 82 Miss. 688, 700, 21 So. 41, 45 (1896).

[70]*Ibid.*

[71]Gathings v. Howard, 122 Miss. 355, 375, 84 So. 240, 243 (1920).

[72]*E.g.*, Sheehan v. Kearney, 82 Miss. 688, 700, 21 So. 41, 45 (1896).

must offer proof to overturn the prima facie case.[73] Where the contestant, by introducing proof tending to show mental incapacity or undue influence, succeeds in defeating the prima facie case, the proponent bears the burden of establishing testamentary capacity by a preponderance of the evidence.[74]

III. Execution

A. Will

1. *General*

The statute provides that a will must be signed by the testator or by another person in his presence and under his express direction.[75] It is further provided that a will must be attested by two or more credible witnesses in the testator's presence, unless it is wholly written and subscribed by him.[76] The Mississippi court has indicated that the words "signed" and "subscribed," as used in the statute, are not synonymous but denote different meanings.[77] A will which is not completely written and subscribed by a testator and which therefore requires attesting witnesses may be signed anywhere on the instrument.[78] A testamentary instrument which is wholly written by the testator must be subscribed, *i.e.*, the signature must be placed at the end of the instrument in order to dispense with the necessity of attesting witnesses.[79]

2. *Valid Signing*

With reference to what is in fact a valid signing, the court has declared that any signature or mark, signed by the testator or by another in his presence and at his direction as his completed signature, and acknowledged and adopted by him at the time as his signature in the presence of the witnesses, is sufficient.[80] It can therefore be perceived that a testator may sign by his mark, his initials, or a fictitious name, or he may direct another person to do so in his presence.[81] If a testatrix signs her will by a mark, the fact that her name is written beside the mark by another person without her consent will not invalidate the

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[73]*Ibid.*

[74]*E.g.*, Isom v. Canedy, 128 Miss. 64, 73, 88 So. 455, 458 (1921).

[75]Miss. Code Ann. § 657 (1956).

[76]*Ibid.*

[77]Baker v. Baker's Estate, 199 Miss. 388, 392, 24 So. 2d 841, 843 (1946).

[78]*E.g.*, Armstrong v. Walton, 105 Miss. 337, 62 So. 173 (1913).

[79]*E.g.*, Better v. Hirsch, 115 Miss. 614, 76 So. 555 (1917).

[80]*E.g.*, Sheehan v. Kearney, 82 Miss. 688, 691, 21 So. 41, 42 (1896).

[81]*Id.* at 691-92, 21 So. at 42.

instrument, for the mark itself is a sufficient signing.[82] A sufficient signing may also be effected by another person's guiding the hand of the testator at the testator's direction.[83] However, there is no valid signature if the name of the testator, followed by the words "writing this," appear as a caption to the instrument, for the words are merely descriptive.[84]

3. *Attestation*

a. *Purpose*

The purpose of the statutory requirement that a will be attested by two or more credible witnesses in the presence of the testator is to identify the instrument as that signed by the testator, to prevent fraud in establishing spurious wills, and to indicate persons whose testimony can establish the validity of a will when it is offered for probate.[85] Attesting witnesses must sign their names upon the instrument in the testator's presence, but no particular form of words is necessary to constitute a sufficient attestation.[86] However, this is certainly not to suggest that an attestation clause is superfluous and should be omitted. The word "attested" contemplates more than a mere signature,[87] for the attesting witnesses have the duty to make sure that the instrument attested is the exact paper signed by the testator and that the testator is competent to execute a will.[88] It is not, however, essential that the witnesses know the contents of the will.[89]

b. *Witnesses*

The word "credible," as used in the statute requiring that attesting witnesses be credible people, has been interpreted to mean competent rather than credible.[90] The reason for that construction is that the validity of a testamentary disposition does not depend upon whether the witnesses are men of truthful character or reputation but whether they are competent to testify in court.[91] Although a devise or bequest to a witness is void, he is a competent attesting witness in regard to the residue of the will, and he may be compelled to testify.[92] The

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[82]See Wallace v. Harrison, 218 Miss. 153, 65 So. 2d 456 (1953).

[83]Watson v. Pips, 32 Miss. (3 George) 451 (1856).

[84]Baker v. Baker's Estate, 199 Miss. 388, 24 So. 2d 841 (1946).

[85]Fatheree v. Lawrence, 33 Miss. (4 George) 585, 624 (1857).

[86]*Ibid.*

[87]Maxwell v. Lake, 127 Miss. 107, 112, 88 So. 326, 330 (1921).

[88]*E.g.*, Tyson v. Whitehead, 154 Miss. 381, 393, 122 So. 496, 499 (1929).

[89]*Id.* at 390, 122 So. at 498.

[90]*E.g.*, Wallace v. Harrison, 218 Miss. 153, 162, 65 So. 2d 456, 459 (1953).

[91]See Wallace v. Harrison, 218 Miss. 153, 162, 65 So. 2d 456, 459 (1953).

[92]Miss. Code Ann. § 661 (1956).

situation must be such that the will cannot be proved without that particular witness in order to void the disposition to him.[93] The term "proved" for this purpose has reference to the execution of the will and not to proof of its contents.[94] An executor of a will is not precluded, on account of the commissions he received, from being a competent witness to sustain the will,[95] and an executor is competent even though he is a devisee.[96] The husband or wife of a beneficiary under a will is competent to establish the execution of the will.[97] A creditor of the testator is not barred as an attesting witness, but any special provision in the will in his favor shall be void and the claim shall stand as though the provision had not been made.[98]

c. *Position of Signature*

It has been held that the signature of an attesting witness may be placed anywhere on the instrument, as a subscription is not necessary.[99] However, throughout the cases the court refers to attesting witnesses as "subscribing witnesses." It is not essential that the signature be written on the same sheet of the instrument as is that of the testator.[100] The witness may even sign on a sheet separate from the will, provided that the sheet is folded together with the will.[101] The affixing of his signature by the attestor prior to the signing by the testator does not invalidate the will if the execution by the testator and the signing by the witnesses constitute one continuous transaction, for the time intervening between the two signatures is too brief to be considered.[102] The court has also upheld an attestation in a case where one of the two witnesses received the testator's acknowledgement and signed his name in the acknowledgement blank, on the basis that it was obvious that the witness took the acknowledgement and signed his name to evidence the fact that he had witnessed the will.[103]

The requirement that the testator must request the witnesses to attest his will is satisfied by a request, in the testator's presence, by the person entrusted with preparing the will.[104] There need be no formal

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[93]*Ibid.*

[94]Swanzy v. Kolb, 94 Miss. 10, 46 So. 549 (1908).

[95]Rucker v. Lambdin, 20 Miss. (12 S. & M.) 230 (1849).

[96]Kelly v. Miller, 39 Miss. (10 George) 17 (1860).

[97]Gore v. Dace, 157 Miss. 221, 127 So. 901 (1930).

[98]Miss. Code Ann. § 662 (1956).

[99]Murray v. Murphy, 39 Miss. (10 George) 214 (1860).

[100]Bolton v. Bolton, 107 Miss. 84, 64 So. 967 (1914).

[101]*Ibid.*

[102]Gordon v. Parker, 139 Miss. 334, 104 So. 77 (1925).

[103]Bolton v. Bolton, 107 Miss. 84, 64 So. 967 (1914).

[104]Green v. Pearson, 145 Miss. 23, 110 So. 862 (1927).

request so long as the witnesses are made to understand that the testator wants them to know that the instrument is his and that he desires them to attest the will.[105]

d. *Signing in the Presence of the Testator*

The object of the statutory requisite that the attestation occur in the presence of the testator is that he may know the identity of the instrument attested and thereby prevent the fraudulent substitution of another paper.[106] The statute contemplates, in addition to physical presence, a consciousness and understanding by the testator of the act performed before him.[107] In fact, it is not essential that the testator and the witness be in the same room or house or that the testator actually see the attestation, so long as it is within his view from his position, provided he has the ability to change his position and see the signing if he desires.[108] The attesting witnesses need not sign the will in the presence of each other.[109] The testator is not required to affix his signature in the presence of the witnesses, for it is sufficient if he produces the will and declares it to be his will, stating that the signature is his and that he wrote it.[110] There was thus held to be a valid attestation in a case in which a testator directed another person to sign his will and then to sign as witness, and he afterward exhibited the instrument to two other persons and declared it to be his will and the signature to be his, whereupon they signed as witnesses.[111] It has been determined that where a testator did not sign his will in the presence of the witnesses nor identify the paper as his will or the signature as his own, the lower court committed reversible error in instructing the jury that the will was duly executed.[112] The court has on several occasions stated that it is unnecessary that a testator make a formal publication of his will.[113] But it may be concluded, from a consideration of the cases, that if the witnesses do not actually see the testator sign the will, he must declare to them that the instrument is his will and that the signature is his own, so that the witnesses may understand the purpose of their signatures.[114]

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[105] *Ibid.*

[106] Watson v. Pipes, 32 Miss. (3 George) 451, 467 (1856).

[107] *Id.* at 467-68.

[108] *Id.* at 468.

[109] *E.g.*, Austin v. Patrick, 179 Miss. 718, 176 So. 714 (1937).

[110] *Ibid.*

[111] Miller v. Miller, 96 Miss. 526, 51 So. 210 (1910).

[112] Maxwell v. Lake, 127 Miss. 107, 88 So. 326 (1921).

[113] *E.g.*, Watson v. Pipes, 32 Miss. (3 George) 451 (1856).

[114] See Maxwell v. Lake, 127 Miss. 107, 115, 88 So. 326, 331 (1921).

4. *Dating of Will*

The court has held that it is not necessary to the validity of a will that it be dated.[115] The court in that case observed that the date might be important in a holographic will, since there is no requirement that it be witnessed.[116] But it was later held that a holographic instrument will be valid if the date of the month in which it was executed is not specified.[117] It was noted that the only time the date might be material would be when there is an issue as to capacity to make a will at that particular time or a question concerning which of two or more wills executed during the same month and year was the last one to be executed.[118]

From a consideration of the cases relating to the execution of wills, it may readily be seen that Mississippi has adopted and employs a liberal construction of the statute favorable to the upholding of wills so far as the formalities of execution are concerned. However, it is submitted that the skillful attorney should avoid all situations which conceivably might be questionable and which might thus call in doubt the validity of the testament.

B. Holographic Will

The statute[119] relating to the execution of wills states in effect that if a will is wholly written and subscribed by the testator, no attesting witnesses are necessary in order to validly execute the instrument. The will thus described is termed a holographic will. In order for an instrument to take effect as a valid holographic will, it must be subscribed by the testator or another for him, and nothing can be given effect which appears beneath the signature.[120] The purpose of the requirement of subscription is that the face of the instrument will show that the testamentary purpose has been completed and that fraud may be prevented.[121] The requisite that a holographic will be wholly written by the testator means that it be in his handwriting.[122] There is not a failure to comply with this requirement if words in the will are written by another but do not materially affect the meaning and purpose of the will.[123] But it has been held that in order to incorporate an extrinsic

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[115]Lee v. Stewart, 139 Miss. 287, 104 So. 89 (1925).

[116]*Ibid.*

[117]Estes v. Estes, 200 Miss. 541, 27 So. 2d 854 (1946).

[118]*Id.* at 547-48, 27 So. 2d at 856.

[119]Miss. Code Ann. § 657 (1956).

[120]*In re* George's Estate, 208 Miss. 734, 749, 45 So. 2d 571, 572 (1950).

[121]*Ibid.*

[122]See Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916).

[123]Baker v. Brown, 83 Miss. 793, 36 So. 539 (1904).

document in a holographic will, the document must also be written by the testator, on the theory that the whole will must be in the handwriting of the testator.[124] It is submitted that such a result does not reflect logical thinking.

IV. Revocation

A. General

Revocation is the termination of the potential capacity of a will to operate upon the death of the testator, either by his act or by operation of law.[125] It is provided by statute that in order to effect a revocation of his will or any clause thereof, the testator must destroy, cancel, or obliterate his will, or cause it to be done in his presence, or else he must execute in writing another will, a codicil, or declaration.[126] A partial revocation is thus possible. The mental capacity necessary to revoke a will is the same as that necessary to execute a will.[127] There must be an intent to revoke except where revocation occurs by operation of law, and such intent must exist clearly and unequivocally.[128] It has been said that if the testator follows one of the statutory methods for revoking a will, his act is ineffectual as a revocation unless an intent to revoke appears.[129] The language of the statute absolutely precludes the introduction of parol testimony to change a will.[130] With reference to the physical destruction, cancellation, or obliteration necessary for revocation, it has been determined that the tearing off by the testator of his signature is sufficient,[131] as is his interlining of the will accompanied by erasures in several places.[132] But it was decided that there was no revocation in a case where wills were executed in duplicate, both were found among the decedent's valuable papers, and only the ribbon copy had been mutilated but in such manner that none of the sheet was torn off and all legally necessary signatures were legible.[133]

B. Dependent Relative Revocation

The doctrine of dependent relative revocation is that a purported revocation by a testator, laboring under a mistake of law or fact in con-

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[124]Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916).

[125]Atkinson, Wills, 419 (2d ed. 1953).

[126]Miss. Code Ann. § 658 (1956).

[127]Watkins v. Watkins, 142 Miss. 210, 234, 106 So. 753, 757 (1926).

[128]McCormack v. Warren, 228 Miss. 617, 628-29, 89 So. 2d 702, 706 (1956).

[129]*Id.* at 629, 89 So. 2d at 706.

[130]Hilton v. Johnson, 194 Miss. 671, 12 So. 2d 524 (1943).

[131]*E.g.*, Tucker v. Whitehead, 59 Miss. 594 (1882).

[132]Bohanon v. Walcott, 2 Miss. (1 How.) 336 (1836).

[133]McCormack v. Warren, 228 Miss. 617, 89 So. 2d 702 (1956).

nection therewith, is dependent upon the existence of the situation as believed by the testator, and is therefore not effective.[133a] The Mississippi court applied this doctrine to a situation where the testator destroyed his will in the belief that it had been revoked by another will which was not attested and was thus invalid.[133b] The court held that the testator intended to revoke the first will only if the second was valid and that the attempted revocation failed.[133c]

C. Presumptions

If a will which cannot be located after the testator's death is shown to have been in his possession when last seen, a rebuttable presumption arises that he destroyed it animo revocandi.[134] The proponent, in order to overcome the inference, must prove that the will existed at a time when the testator was mentally incapacitated to revoke the will and that he never thereafter became competent to revoke it.[135] Where there are duplicate wills and the testator has retained only one of them, his destroying the copy that he possesses with intent to revoke the will raises a rebuttable presumption that he intends thereby to revoke the instrument.[136] Although the presumption does exist where he retains both copies and destroys one of them, it is much weaker than in the prior situation.[137] The evidence necessary to overcome a presumption that a lost will was destroyed animo revocandi must be clear and convincing.[138] If it is not proved that the will was destroyed and nothing is presented that makes it probable that the testator would have wished to revoke it, only slight evidence would be essential in order to rebut the presumption.[139]

D. Revocation by a Writing

A revoking will or codicil, to be effective, must be executed in conformity with the statute prescribing the requirements for the execution of testamentary instruments.[140] Therefore, such an instrument which is not properly attested has no affect on an existing will.[141] Similarly, if the revoking paper is not signed in the presence of an

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[133a] ATKINSON, WILLS, 452 (2d ed. 1953).

[133b] Wilbourn v. Shell, 59 Miss. 205 (1881).

[133c] *Ibid.*

[134] *E.g.*, Watkins v. Watkins, 142 Miss. 210, 234, 106 So. 753, 757 (1926).

[135] *Ibid.*

[136] Phizee v. Alexander, 210 Miss. 196, 49 So. 250 (1950).

[137] *E.g.*, Adams v. Davis, 233 Miss. 228, 237, 102 So. 2d 190, 194 (1958).

[138] James v. Barber, 244 Miss. 234, 248, 142 So. 2d 21, 27 (1962).

[139] Adams v. Davis, 233 Miss. 228, 238, 102 So. 2d 190, 194 (1958).

[140] Kennard v. Evans, 218 Miss. 176, 187, 65 So. 2d 285, 289 (1953).

[141] Hawkins v. Duberry, 101 Miss. 17, 57 So. 919 (1912).

attesting witness, the testator must inform the witness that it is a revoking instrument and that the signature is his own.[142] It is not necessary that the instrument be dated or that it contain the date of the will which the testator proposes to revoke, provided that such will is referred to and sufficiently identified.[143] It is not essential that a second will contain express words of revocation, for a revocation may be effected by a later will, the provisions of which are inconsistent with those of a prior will.[144] A codicil can effect a revocation only to the precise extent that it, either by express language or by necessary implication, modifies the former provisions.[145] Presumably, if a second will revokes a prior instrument by inconsistent provisions and not expressly, to the extent that it does not make a disposition of the whole estate, it will not revoke the provisions pertaining to the remaining property in the prior will. It has been held that a duly executed second will which makes a disposition of the entire estate is effective to revoke a prior will, even though the dispositive provisions are inoperative on account of the incapacity of the beneficiary of the will to take under the instrument.[146] In that case the sole beneficiary under the second will was an attesting witness.

E. Revocation by Operation of Law

In addition to the method provided for under the statute, a testamentary instrument may be revoked by implication or inference of law.[147] The court has stated that a conveyance of property previously devised will revoke the devise if the provisions of the deed are totally inconsistent with the devise.[148] But a deed can revoke a will only as to the particular realty conveyed by the deed,[149] as the effect is the withdrawal of the property from the operation of the will.[150] It has been concluded that the doctrine of implied revocation is limited in Mississippi to the execution of conflicting deeds and other instruments.[151] Therefore, a will is not revoked by the subsequent marriage of a testator, even though a widow is a statutory heir.[152] However, it may be that revoca-

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[142]Kennard v. Evans, 218 Miss. 176, 190, 65 So. 2d 285, 290-91 (1953).

[143]*Id.* at 188, 65 So. 2d at 291.

[144]*E.g.*, Wheat v. Locals, 139 Miss. 300, 104 So. 73 (1925).

[145]Klein v. Gaines, 203 Miss. 871, 34 So. 2d 488 (1948).

[146]Crawford's Estate v. Crawford, 225 Miss. 208, 82 So. 2d 823 (1955).

[147]Caine v. Barnwell, 120 Miss. 209, 226, 82 So. 65, 66 (1919).

[148]*Id.* at 228, 82 So. at 66.

[149]Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908 (1949).

[150]Gore v. Ligon, 105 Miss. 652, 63 So. 188 (1913).

[151]*In re* Stoball's Will, 211 Miss. 15, 24, 50 So. 2d 635, 638 (1951).

[152]Hoy v. Hoy, 93 Miss. 732, 48 So. 903 (1909).

tion will occur if the birth of a child follows the marriage.[152a] The forcible preventing of a testator from revoking his will will not operate to effect a revocation by implication.[153] This is posited on the theory that the testator's attempt is to revoke the will, which can be effected only by compliance with the statute.[154] There are statutory provisions with respect to posthumous children and other children born after the execution of the will which permit such children to take an intestate share against the will.[155] The effect of these statutes on a will would be that of a pro tanto revocation.

F. No Revival

The Mississippi Supreme Court long ago declared that "when a will has been revoked, either expressly or impliedly, it is gone forever."[156] The court further stated that a revoked will has no present or potential existence but that the testator may by a new and express act adopt it as his will.[157] However, it was emphatically stated that this process was not one of revival.[158]

IV. Renunciation

A. General

It is provided by statute that a widow may, within six months after the probate of her deceased husband's will, renounce the will where satisfactory provision has not been made for her by the will.[159] After filing a formal renunciation in the office of the chancery clerk, she will be entitled to the proportion of her husband's real and personal property that she would have taken had he died intestate, subject to the limitation that she can in no event obtain more than one-half of the estate.[160] This section must be read in conjunction with section 470[161] of the code which makes of a surviving spouse a statutory heir and empowers him or her to take a child's share of intestate property. Therefore, the widow, upon renouncing the testator's will, is entitled to a child's portion of the estate, unless there are no children, in which case

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[152a] *Id.* at 757, 48 So. at 905.

[153] Minor v. Russell, 126 Miss. 228, 88 So. 633 (1921).

[154] *Ibid.*

[155] Miss. Code Ann. §§ 658, 659 (1956).

[156] Bohanon v. Walcott, 2 Miss. (1 How.) 336 (1836).

[157] *Ibid.*

[158] *Ibid.*

[159] Miss. Code Ann. § 668 (1956).

[160] *Ibid.*

[161] Miss. Code Ann. § 470 (1956).

she is limited to one-half of the estate.[162] A surviving husband has a corresponding right to renounce, equivalent to that of a widow.[163] If no provision is made in the will for the surviving spouse, no formal renunciation is necessary in order that he or she be qualified for a share of the estate.[164]

If the widow possesses separate property which is equal in value to what would be the value of her lawful share of the deceased spouse's estate, she cannot renounce the will and take a share.[165] But she may exercise the renunciatory right if her separate property does not equal in value the property which would be her maximum portion of the estate.[166] The amount to which she would be entitled under these circumstances is equal to the difference in value between her separate property and that which, if she had no property, would be her lawful share of the estate.[167] However, if her property values at less than one-fifth of her lawful portion, she can take her entire share of the deceased husband's estate.[168] This discussion applies equally to a surviving husband.[169]

B. Time to Elect

The six month statutory period extends from the date of the probate of the will rather than from the date of the filing for probate.[170] A failure to renounce within this time is equivalent to an election to take under the will,[171] as the courts will not extend the period within which renunciation can be made, even for two or three days.[172] The court has not decided whether or not a renunciation can be filed after, and within six months of, the termination of an unsuccessful contest of a will.[173] However, the statute applies only to domestic wills.[174] The surviving spouse and not the court determines what is and what is not a satisfactory provision in the particular will.[175]

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[162]Miss. Code Ann. § 668 (1956).

[163]*Ibid.*

[164]Miss. Code Ann. § 669 (1956).

[165]Miss. Code Ann. § 670 (1956).

[166]*Ibid.*

[167]*Ibid.*

[168]*Ibid.*

[169]*Ibid.*

[170]Simpson v. Simpson, 120 Miss. 197, 82 So. 3 (1919).

[171]Collins v. Melton, 40 Miss. (1 Reyn.) 242 (1866).

[172]*Ex parte* Moore, 8 Miss. (7 How.) 665 (1843).

[173]Edwards v. Edwards, 193 Miss. 889, 894, 11 So. 2d 450, 452 (1943).

[174]Wilson v. Cox, 49 Miss. (1 Harr. & Sim.) 538 (1873).

[175]Simpson v. Simpson, 120 Miss. 197, 82 So. 3 (1919).

C. Who May Elect

Since the right of election is personal,[176] a creditor cannot renounce for the surviving spouse,[177] nor can the administrator of the estate of the survivor who died before making an election, even though the six month period has not expired.[178] However, where the widow is insane, the right of election may be exercised by her guardian with the permission of the court.[179] By contesting the validity of a will, she does not estop herself from thereafter renouncing it.[180] If she appeals from a decree establishing her deceased husband's will, she may, during the pendency of the appeal, renounce the will, within the statutory period, without barring her right to prosecute the appeal.[181] The reasoning of the court here was that a renunciation affects, not the validity of the will, but only the amount of property which the renouncer and the beneficiaries under the testament will receive.[182] Also, there is no inconsistency, for under both the renunciation and the contest, she takes by inheritance.[183]

If the husband and wife are separated at the time of the husband's death, she will not be precluded from renouncing the will if she was justified in living apart from him.[184] However, if the separation amounts to a desertion and the deserting spouse contracts a bigamous marriage, he will be estopped from renouncing the deceased spouse's will.[185] A recent case, while not on the subject of renunciation, indicates that the estoppel will be imposed only if the surviving spouse actually married another without there first being a divorce.[186] A husband or wife who wilfully procures the death of his or her spouse will be unable to renounce the will and take a share of the estate.[187] To qualify as a wilful killing under these statutes, it is not essential that there be a murder, but it is necessary that the homicide be wilful and without justification in law.[188]

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[176]Mullins' Estate v. Mullins' Estate, 239 Miss. 751, 125 So. 2d 93 (1960).

[177]Carter v. Harvey, 77 Miss. 1, 25 So. 862 (1899).

[178]Mullins' Estate v. Mullins' Estate, 239 Miss. 751, 125 So. 2d 93 (1960).

[179]Hardy v. Richards, 98 Miss. 625, 54 So. 76 (1911).

[180]Simpson v. Simpson, 120 Miss. 197, 82 So. 3 (1919).

[181]Edwards v. Edwards, 193 Miss. 889, 11 So. 2d 450 (1943).

[182]*Id.* at 894, 11 So. 2d at 451.

[183]*Ibid.*

[184]Stringer v. Arrington, 202 Miss. 798, 32 So. 2d 879 (1947).

[185]Williams v. Johnston, 148 Miss. 634, 114 So. 733 (1927).

[186]See Rowell v. Rowell, 170 So. 2d 267 (Miss. 1964).

[187]See MISS. CODE ANN. §§ 479, 676 (1956).

[188]Henry v. Toney, 211 Miss. 93, 50 So. 2d 921 (1951).

D. Rights of Renouncer

If a widow fails to renounce, where provision is made for her, and elects to take under her deceased husband's will, she takes property just as any other beneficiary.[189] It has already been noted that, upon renunciation, she has a right to the same proportion of the estate to which she would have been entitled if her husband had died intestate, as limited to a maximum of one-half of the estate if there are no children.[190] Her portion is not obligated primarily with the claims against the estate.[191] Thus, she has a right to receive her share after the payment of debts from the whole estate.[192] Since section 668 refers only to the property passing under the will, the surviving spouse, to the extent that the decedent spouse was partially intestate, is entitled, as heir, to his share of the intestate portion of the estate in accordance with the laws of descent and distribution and independent of the statutory maximum limit.[193] The renouncing survivor may take her share of the personalty of the estate, even to the extent of impairing a trust fund created by the will.[194] Her right is to take, not a share from each of several cash funds, but rather a share of the total of the cash assets.[195] But since a mortgaged indebtedness which is not probated is not an obligation of the estate, the dissenter to the will would take her interest in such mortgaged land, subject to the indebtedness.[196] The renouncer becomes a cotenant with the devisees in all realty devised by the deceased spouse.[197]

A widow who has not renounced her decedent husband's will is not entitled to his property exempt from execution, if he has disposed of it by will, since the statute[198] contemplates that the widow shall take such property only by descent and distribution.[199] It follows that she, after renouncing the will, has no right to a specific portion of such exempt property but will be able only to take her share of the estate generally.[200] And exempt property for this purpose includes the home-

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189Clark v. Clark, 126 Miss. 455, 89 So. 4 (1921).

190Miss. Code Ann. § 668 (1956).

191Gordon v. James, 86 Miss. 719, 740-41, 39 So. 18, 20 (1905).

192*Ibid.*

193Cain v. Barnwell, 124 Miss. 860, 87 So. 484 (1921).

194Campbell v. Cason, 206 Miss. 420, 440, 40 So. 2d 258, 261 (1949).

195*Id.* at 442, 40 So. 2d at 262.

196*Id.* at 438, 40 So. 2d at 261.

197Gordon v. James, 86 Miss. 719, 743, 39 So. 18, 21 (1905).

198Miss. Code Ann. § 476 (1956).

199Turner v. Turner, 30 Miss. (1 George) 428 (1855).

200Nash v. Young, 31 Miss. (2 George) 134 (1856).

stead.[201] If a testator bequeaths a sum to his wife and provides that it will be in lieu of all exemptions and demands on his estate, the widow cannot, without renouncing the will, claim the statutory allowance for one year's support.[202] But a testator's making provisions for his wife, in itself, with nothing more, is not a manifestation that he has provided for his wife in lieu of the allowance for one year's support.[203] Therefore, under such circumstances she may claim her allowance, even though she does not renounce the will.[204]

E. Lawful Portion and Separate Property

The cases have held, in conformity with section 670, that the elective right of the surviving spouse is limited by the provisions of that statute.[205] The survivor is not a creditor of the estate and is thus entitled to property from the estate rather than to have money "made up to her."[206] The meaning of the term "lawful portion," as used in section 670, where there is either no child or one child, is one-half of the value of the estate of the deceased spouse.[207] Presumably, where there exist two or more children, a lawful portion denotes an amount of property equal to the value of a child's share. Therefore, the amount of the estate to which the surviving spouse is entitled is determined by subtracting the value of the survivor's estate from the value of the lawful portion.[208]

For the purposes of ascertaining the value of the separate property of the surviving spouse, the proceeds of a life insurance policy, taken out by the deceased husband naming his wife as beneficiary, will be included in the widow's separate estate.[209] However, if the widow takes the proceeds by law as heir, and not as beneficiary, the money will not be included in her estate.[210] A joint bank account in the name of the husband and wife is includable.[211] In computing the value of the estate of the deceased spouse, the following properties will be excluded: certificate of deposit in the name of the decedent or another, United States savings bond payable jointly to the deceased spouse or a de-

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[201]Osburn v. Sims, 62 Miss. 429 (1884).

[202]McGaughey v. Eades, 78 Miss. 853, 29 So. 516 (1901).

[203]Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371 (1928).

[204]See Gilmer v. Gilmer, 151 Miss. 23, 117 So. 371 (1928).

[205]*E.g.*, Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1957).

[206]Gordon v. James, 86 Miss. 719, 743, 39 So. 18, 21 (1905).

[207]Davis v. Miller, 202 Miss. 880, 32 So. 2d 871 (1948).

[208]*Ibid.*

[209]Osburn v. Sims, 62 Miss. 429 (1884).

[210]O'Reily v. Laughlin, 92 Miss. 121, 45 So. 19 (1907).

[211]Carter v. Evans, 230 Miss. 803, 94 So. 2d 237 (1957).

signated third person, and land conveyed to one person by a deed given to another person who was to hold it until the decedent's death.[212]

The executor or any other person interested in the estate may petition the court for appointment of three commissioners to value the estate of the deceased and that of the survivor, but all interested persons must be made parties to the proceeding.[213] This petition cannot be heard by the court until twelve months after the probate of the will and after the estate is settled by the court.[214]

F. Affect on Other Beneficiaries

A renunciation by the surviving spouse will not invalidate the will and render the estate intestate, for although the renouncer becomes an heir to his or her share, the devisees remain beneficiaries under the will as to the remainder of the estate.[215] Any abatement of personalty caused by renunciation will fall first upon the residuary legatee, and only if the residuum is insufficient will specific legacies be abated.[216] Upon renunciation of a will devising certain property to the wife, the interest to which she is not entitled descends as intestate property and does not go to a residuary devisee.[217] The renunciation of a will which makes for the widow a provision for a life estate will accelerate the remainder interest, *i.e.*, the renunciation is equivalent to her death with reference to the remainder's taking effect in possession.[218] On a similar basis, if a trust fund is created by the will with income to be paid the wife and the corpus to be distributed to the children on her death or remarriage, upon her renunciation, the fund is to then be divided among the children,[219] upon the assumption that the interest of the children in the trust fund is construed as fully vested. If the situation involves a defined monthly payment but with the same contingency, a renunciation will entitle the children to receive the monthly payments.[220] While the Mississippi court recognizes the doctrine of acceleration, the principle will not be applied where the remainder is not vested, *i.e.*, contingent.[221]

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[212]Myers v. Laird, 230 Miss. 675, 93 So. 2d 828 (1957).

[213]Jones v. Jones, 94 Miss. 460, 49 So. 115 (1909).

[214]Simpson v. Simpson, 120 Miss. 197, 82 So. 3 (1919).

[215]*E.g.*, Edwards v. Edwards, 193 Miss. 889, 11 So. 2d 450 (1943).

[216]Campbell v. Cason, 206 Miss. 420, 443, 40 So. 2d 258, 262 (1949).

[217]Gordon v. Perry, 98 Miss. 893, 54 So. 445 (1911).

[218]Rose v. Rose, 126 Miss. 114, 88 So. 513 (1921).

[219]Callicott & Norfleet v. Callicott, 90 Miss. 221, 43 So. 616 (1907).

[220]Milton v. Milton, 193 Miss. 563, 10 So. 2d 175 (1942).

[221]Rose v. Rose, 126 Miss. 114, 88 So. 513 (1921).

V. "Just Debts be Paid" Provision

Many testators include in their wills a provision that all of their just debts be paid by their executors, or some similar direction. There has been some question concerning whether such a clause creates a trust for the benefit of creditors. The effect of the imposition of a trust would be that the claims of creditors would not be barred by the statute of nonclaim.[222] Creditors would thus not be compelled to have their claims against the estate probated and registered as required by law. However, in the absence of a trust, the statute can be invoked against the claims of creditors.

The first case[223] to approach this problem was decided in 1887. The court there stated that where the estate is liable for payment of the decedent's debts, a trust for that purpose will not be implied or derived from an ambiguous or uncertain testamentary provision.[224] In finding that the will expressly charged the estate with the payment of the testator's debts, the court concluded that the decedent had thus intended and declared a trust and therefore held that a trust was created, which prevented the running of the statute of limitations against the debts.[225] The language of the pertinent provision was not recited in the opinion, as that which was stated was the court's interpretation of that provision. In a later case,[226] there was testimony, after the destruction of the will, that a provision had instructed that debts should be paid out of the estate as speedily as possible and that the executor be authorized to sell any part of the estate for payment of debts. The court stated that the "trust should not only be express, but clear and precise," and held that the intention to create a trust was not sufficiently manifested.[227] One factor that might have influenced the decision of this case was that the will was no longer in existence.

In *Gordon v. McDougall*[228] the court held that a trust was created. In the will here involved, there were provisions, in addition to the direction that all debts be paid, relating to payment of debts. The court found that the testator manifested throughout the will a paramount purpose to pay his debts first of all and at all events.[229] It was noted that the testator apparently took much pride in paying his obligations.[230]

222Miss. Code Ann. § 569 (1956).

223Abbay v. Hill, 64 Miss. 340, 1 So. 484 (1887).

224*Ibid.*

225*Ibid.*

226Gwin v. Nettles, 18 So. 798 (Miss. 1895).

227*Id.* at 799.

22884 Miss. 715, 37 So. 298 (1904).

229*Id.* at 725, 37 So. at 302.

230*Id.* at 722, 37 So. at 300.

The court therefore held that the language of the will and the circumstances demonstrated an intention to create an express trust. Soon thereafter, it was determined that, where a bequest was made stating that it was based upon a valuable consideration and that it was to be a charge on the estate and to take precedence over other bequests, an express trust was imposed on the executors to pay the debt.[231]

The court later decided that, where there was a provision that all just debts be paid and nothing more, a trust would not be inferred.[232] Since the property was charged by operation of law with the payment of debts and since the executors were also under the duty of applying it thereto, no intention to create a trust clearly appeared.[233] In *Cohn v. McClintock*,[234] rendered the next year, the court noted that such a provision was the usual stock phrase employed by writers of wills. It was observed that a second clause in the will merely directed the payment of debts in preference to the distribution of the estate, a duty which the executors were legally bound to perform.[235] The court noted that the will which it was called upon to construe was much different from the will in the *Gordon* case. The result reached in the *Cohn* case was affirmed by the court in 1915,[236] 1938,[237] and 1941.[238]

After the *Cohn* decision, a case[239] arose where a will contained, in addition to the standard direction that all legal claims against the estate be paid, a provision that various properties had been made payable to the estate of the testator to be applied to his debts. The court held that a trust for the benefit of creditors had been constituted to the extent of the property specifically segregated in the will for that purpose.[240] Later, where a will included, besides the standard clause, a provision that the wife of the testator was to receive all of his property, subject to the payment of his debts, the court concluded that a trust for the payment of debts was created thereby.[241]

From a consideration of the cases in point, it appears that whether or not a trust for the payment of debts of the testator is constituted depends upon the construction of the language used in the will and

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[231]O'Reilly v. McGuiggan, 91 Miss. 498, 44 So. 986 (1907).

[232]Cudahy Packing Co. v. Miller's Estate, 103 Miss. 435, 60 So. 574 (1913).

[233]*Ibid.*

[234]107 Miss. 831, 66 So. 217 (1914).

[235]*Id.* at 840, 66 So. at 219.

[236]*Ibid.*

[237]Stevens v. Dunlap Mercantile Co., 108 Miss. 690, 67 So. 160 (1915).

[238]Fidelity & Deposit Co. v. Doughtry, 181 Miss. 586, 179 So. 846 (1938).

[239]Hathaway v. North, 190 Miss. 697, 1 So. 2d 490 (1941).

[240]Rainey v. Rainey, 124 Miss. 780, 87 So. 128 (1921).

[241]Hanson v. Davis, 132 Miss. 81, 95 So. 787 (1923).

possibly from the attendant circumstances. It seems clear that a mere direction in a will for the payment of debts, with nothing more, will not impose a trust for the benefit of creditors. The court will declare that a trust has been created only where satisfied, from the provisions of the will as a whole, that the testator intended to create a trust. However, the line between what will and what will not be held to be a trust appears to be not always clearly distinguishable. Any provision instructing that the debts of the testator be paid is superfluous because the estate is liable by law for the debts of the decedent. It is reiterated that if a trust is created for the benefit of creditors, the statute of nonclaim will not run against the creditors. It is therefore submitted that, to avoid any possible difficulties, the testator should not include in his will any provision that directs that his debts be paid.

VI. Conclusion

It may be observed from the foregoing discussion that there are various aspects of the law of wills with which every lawyer should be acquainted. The purpose of this treatment has been to examine the principal statutes relating to wills and the case law construing them, and to deal with certain other problems considered of some importance. Of course there are many facets of wills law that are important, but a discussion of this length is confined in its scope to only a limited area of this field of law.

Tom S. Lee

PRE-TRIAL PUBLICITY AS DENIAL OF DUE PROCESS

I. Introduction

Recently, much has been said about the shocking and embarrassing way in which members of the Bar and Bench and the employees of the news media conducted themselves after the assassination of President Kennedy. The problems involved in balancing the interest of the public in knowing the facts, and the interest of the news media in preserving the right to freedoms of speech and press,[1] and the interest of a criminal defendant in having his right of liberty, property, and life protected by the safeguard of due process,[2] were most perplexing, and it seems that the action that was taken to achieve a satisfactory result fell far short of guaranteeing to the criminal defendant even the remotest possibility of having a fair trial.[3] This was not a problem that first arose in Dallas, nor has the legal community failed to recognize before its responsibility to preserve for a criminal defendant the right to a trial that is free from prejudice engendered by the sometime irresponsible activities of the disseminators of "news." The problem is to preserve the freedom of the press but safeguard the constitutional right of the criminal defendant to receive a fair trial before an impartial tribunal which is necessarily free from contamination by the adverse, and often inflammatory, statements that are broadcast and published against the defendant by the news media.

As an example of how the rights of the criminal defendant can be ignored by law enforcement officials, attorneys, and the news media, attention is invited to a series of events which occurred several years ago in Indiana. Six murders had been committed in the vicinity of Evansville between December, 1954, and March, 1955. Naturally the crimes attracted the attention of the news media, and great excitement and indignation were aroused in the area. A man named Irvin was soon arrested by local police officials and charged with the crimes. During the months preceding his trial, a barrage of newspaper stories, cartoons, and pictures were published against the interest of the defendant, and local radio and television stations carried extensive newscasts about him and the murders. Some of these reports dealt with the accused's background, pointing out that early in life he had committed juvenile crimes, that he had been convicted previously of burglary and arson, and that he had been guilty of being absent without leave during the war. He was portrayed as a parole violator. Some reports stated that he had been identified in a line-up, and taken a lie detector test,

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[1]See U.S. Const. amend. I.

[2]See U.S. Const. amends. V and XIV.

[3]See U.S. Const. amend. VI.

and had been placed at the scene of the particular murder for which he was about to stand trial, but that he had refused to confess. Eventually, it was announced in the news that the defendant had confessed to all of the murders. It was reported that he had offered to plead guilty if promised a 99-year sentence, but that the prosecuting attorney was determined to secure the death penalty. One story characterized the defendant as without conscience, but sane in the opinion of a panel of court-appointed doctors. In another story the counsel for the accused was quoted as saying that he had received "much criticism over being Irvin's counsel"; but in defense of the attorney, it was pointed out that the counsel would be subject to disbarment if he refused to represent Irvin. Prior to the trial of the case, opinions of the local people were solicited and recorded on the public streets by a roving reporter and then broadcast over the local stations. These opinions varied from, "I think he is guilty," to, "hang him."

Although a motion for a change of venue was granted, transferring the trial to a court in an adjacent county, about ninety per cent of the prospective jurors examined had the opinion that the accused was guilty. Of the twelve jurors finally selected, eight believed the accused to be guilty.

The defendant was found guilty of murder and sentenced to death. On petition for a writ of habeas corpus, the Supreme Court reversed the conviction and remanded the case for a new trial on the ground that the tribunal did not meet the standards of impartiality required by the Constitution.[4]

II. The Nature of the Conflict Between Free Press and Fair Trial

As previously indicated, the two freedoms that are involved in this dilemma are positively guaranteed by the Constitution. It has been recognized, however, that merely because freedom of the press is expressly guaranteed against infringement by the federal government, as well as by the states,[5] the right to enjoy this freedom is not absolute.[6] While the public is generally benefited by accurate and responsible reporting of crimes and criminal trials,[7] there is the danger that the news media may fail to respect the constitutional right of the prospective criminal defendant to a fair and impartial trial by the people who are exposed to the publicity. It has been suggested that the right of

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[4]See Irvin v. Dowd, 366 U.S. 717 (1961).

[5]See Gitlow v. New York, 268 U.S. 652 (1925) and Schneider v. State, 308 U.S. 147 (1939).

[6]See, *e.g.*, Patterson v. Colorado, 205 U.S. 454 (1907).

[7]See Mueller, *Problems Posed by Publicity to Crimes and Criminal Proceedings*, 110 U. Pa. L. Rev. 1, 9 (1961).

the public to know is a right that must also be considered, and for the government to attempt to infringe upon this right is to exceed the bounds of its authority in our society.[8]

The criticism of the news media's neglect to respect the rights of an accused has generally been well founded. The sensationalism syndrome pervades crime reporting generally. One observer has said that "to portray the accused as a sex fiend is to hit the jackpot."[9] An English court has suggested that adverse matters are publicized so that the people who may have to sit as jurors will be informed beforehand of the accused's bad character.[10] While it is true that the worth of printed material in itself is not determinative of the extent of protection afforded under the law,[11] publishers should refrain, nevertheless, from permitting reports to undermine the processes of justice.[12] "Power in a democracy implies responsibility in its exercise . . . . [F]reedom of the press is not a freedom from responsibility for its exercise."[13]

In a criminal case evidence of an accused's evil character to establish probability of guilt is generally disallowed.[14] Also, the accused's prior troubles, if any, with the law, together with evidence of prior criminal acts, or evil reputation in the community, are inadmissible in court most of the time, even though these facts might tend to persuade a jury that the accused is guilty.[15] Information about lie detector tests is also inadmissible.[16] The exclusionary rules of evidence would clearly be inadequate to prevent prospective jurors from learning about the existence of such facts where newspaper, radio, and television reports contain such information and have such general circulation as to inform improperly those who will eventually be asked to decide the case on the evidence adduced at the trial. A fair opportunity to defend against a particular charge will thereby be denied, whereas if such reports were not able to reach prospective jurors, confusion of issues and undue prejudice would tend to be lessened or eliminated.[17] If there is one fundamental rule of criminal law, it is that the accused is entitled to be tried by jurors whose duty it is to determine the facts based on evidence

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[8] *Id.* at 2.

[9] Daly, *Ensuring Fair Trial and a Free Press: A Task for the Press and the Bar Alike*, 50 A.B.A.J. 1037, 1038 (1964).

[10] Regina v. Odhams Press, Ltd. [1957] 1 Q.B. 73, 81 (1956).

[11] See Winters v. New York, 333 U.S. 507 (1948).

[12] See Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (concurring opinion).

[13] *Id.* at 355-56.

[14] See, *e.g.*, Michelson v. United States, 335 U.S. 469, 476, (1948).

[15] *Ibid.*

[16] See Note, 38 St. John's Law Rev. 136, 138 (1963).

[17] See, *e.g.*, Michelson v. United States, *supra* note 14.

admitted in court, uninfluenced and unbiased by anything they may have seen or heard outside of court.[18] "Not only should the minds of the jurors be without bias or prejudice, but they should be removed from the bias, prejudice and excitement of others."[19]

Another harm that sometimes results from pre-trial publicity in a criminal case is the tendency to "exalt the defendant" and "diminish the abhorrence of the crime."[20] "The tendency to make the criminal a popular hero is a menace to our civilization."[21] Publicity can also condition the public "to expect a certain verdict that may not be forthcoming when the case is heard in full. Then there are outcries that justice is too lenient and that criminals are being set loose in the streets."[22]

Although it is desirable that the press be given the widest latitude possible that is consonant with the orderly administration of justice,[23] it must be recognized that pre-trial publicity may tend to destroy the presumption of innocence. Due to the atmosphere sometimes created, a contrary presumption arises.[24] Newspaper statements are also made without the sanction of an oath, and there is no opportunity for counsel to conduct cross-examination of the proponent.[25] In the past the right of freedom of the press seems to have been given superiority generally by the Supreme Court over the right to a fair trial where there was conflict.[26] But it has been indicated that newspapers may not be within the law when an accused is deprived of a fair trial by irresponsible reporting.[27]

III. The English Solution

In England the courts have uniformly relied on the contempt power to punish attempts by the press and other news media to prejudice the trial of criminal cases, and today the scandal of conviction or acquittal by newspaper is virtually unknown.[28] The courts have no authority to

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[18]Briggs v. United States, 221 F.2d 636, 638 (6th Cir. 1955).

[19]State v. Belt, 79 S.D. 324, 111 N.W.2d 588, 590 (1961).

[20]Taft, *The Press and the Court*, 58 Am. L. Rev. 595, 602 (1924).

[21]*Id.* at 603.

[22]111 Cong. Rec. 381 (daily ed. Jan. 7, 1965) (remarks of Senator Morse).

[23]Atlanta Newspapers, Inc. v. State, 216 Ga. 399, 116 S.E.2d 580, 584 (1960).

[24]Taft, *supra* note 20, at 598.

[25]*Id.* at 597.

[26]See Holtzoff, *The Relation Between the Right to a Fair Trial and the Right of Freedom of the Press*, 1 Syracuse L. Rev. 369, 379 (1950).

[27]See, *e.g.*, Shepherd v. Florida, 341 U.S. 50, 53 (1951) (concurring opinion).

[28]See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 Harv. L. Rev. 885, 910 (1935).

prevent newspapers from referring to pending cases, but the English courts will punish the making of statements which have a tendency to prejudice the issue.[29] It is now considered to be the law of England that the courts unquestionably have the power to punish summarily for contempt even though the act complained of was committed out of court.[30] Notwithstanding the fact that the courts have had this authority since 1765,[31] it does not seem ever to have been contended that the proscribed publications are protected under the doctrine of freedom of the press,[32] even though the right of freedom of the press is recognized under English law.[33]

One accused of a crime can only be convicted on evidence which is legally admissible and which is adduced at the trial.[34] This right of an accused is protected to the extent that after he has been charged with an offense, anyone responsible for publishing matter which tends to interfere with his fair trial is subject to a charge of contempt.[35] In one case the prohibition described was broader: "Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."[36] Once a person has been charged with a crime, no matters tending to interfere with the fair trial can be published, even though it is uncertain at the time whether the accused will be committed for trial.[37]

Neither the truth of the matter published[38] nor the absence of an intent to pervert the course of justice constitutes a defense.[39] The intent to interfere in the processes of the courts is inferred from the statements themselves.[40] It was propounded in a recent case that mens rea is not a necessary element of contempt.[41] The test was said to be whether the statements complained of were calculated to interfere with the course of justice, not whether the particular result was intended.[42]

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[29]*Id.* at 886.

[30]See Fox, *The Summary Process to Punish Contempt*, 25 L.Q. Rev. 238, 240 (1909).

[31]See Fox, *The King v. Almon*, 24 L.Q. Rev. 184 (1908); see also The King v. Davies [1906] 1 K.B. 32, 40-1 (1905).

[32]Holtzoff, *supra* note 26.

[33]*Id.* at 371.

[34]The King v. Tibbits [1902] 1 K.B. 77, 88 (1901).

[35]See The King v. Parke [1903] 2 K.B. 432, 437.

[36]The Queen v. Gray [1900] 2 Q.B. 36, 40.

[37]The King v. Davies, *supra* note 31, at 35.

[38]See Goodhart, *supra* note 28, at 907.

[39]The King v. Tibbits, *supra* note 34, at 88.

[40]*Ibid.*

[41]See Regina v. Odhams Press, Ltd., *supra* note 10, at 80.

[42]*Ibid.*

It was held in this case that even though the contemners did not know that the trial was pending, the citation for contempt was proper under the circumstances.[43]

The English prohibition against interference with a pending case has been extended to include the publication in a newspaper of the photograph of a criminal defendant where it is reasonably apparent that the identity of the accused may be in question.[44] An important case arose in 1936 when a loaded revolver fell near the King's horse during a procession in London. The man who threw the weapon, or from whose hand it was knocked, was charged with being in unlawful possession of a firearm. A news film showing the arrest of the accused was distributed which had the caption: "Attempt on the King's life."[45] The distributors of the film were held in contempt of court, and the proprietors of the cinemas showing the film were sternly warned and ordered to pay the costs of the application against them.[46] A far-reaching decision was also rendered in a case involving the distribution in England of "Newsweek" magazine. The distributors were held in contempt for circulating copies of the magazine which contained inadmissible, prejudicial facts and comment concerning a pending case although they had no actual knowledge of the offensive matter.[47]

The result of these holdings is that the news media must restrict reports after arrest to fair and accurate accounts of the proceedings at the trial.[48] Comment on the proceedings must be confined to reports made after the case has been concluded,[49] that is, after judgment has been rendered, unless an appeal is actually entered.[50] Therefore, no observations on the case are permitted either prior to or during the trial.[51]

The authority of the English courts to punish constructive contempt has been said to be one reason for the confidence of court and counsel in the fairness of jurors.[52] Another patently worthwhile result of this

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[43]*Ibid.*

[44]See The King v. Daily Mirror [1927] 1 K.B. 845, 850.

[45]R. v. Hutchison [1936] 2 All Eng. 1514 (K.B.).

[46]*Id.* at 1515.

[47]Regina v. Griffiths [1957] 2 Q.B. 192; *but see* Note, 73 L.Q. Rev. 467, 469 (1957), where it is said that this decision gives too much discretionary power to a judge.

[48]See Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure,* 21 A.B.A.J. 301, 303 (1935).

[49]MacLatchy, *Contempt of Court by Newspapers in England and Canada,* 16 Can. B. Rev. 273, 276 (1938).

[50]*Id.* at 278.

[51]Robbins, *supra* note 48, at 302.

[52]See Lawson and Keedy, *Criminal Procedure in England,* 1 J. Crim. L.,C. & P. S. 595, 748, 611 (1911).

approach is that an alleged confession of an accused cannot be publicized until it has been admitted in evidence, nor can any other prejudicial matters be published, such as that the defendant is suspected of committing other crimes.[53] Although the procedure of summary punishment has been criticized,[54] at least where it applies to the power to punish for publishing criticism of a judge,[55] the only harm that results from the stricter English view is the restriction of the incidence of the more "sensational forms of gossip";[56] if that is harmful.

IV. Available Safeguards in the United States

A. Contempt

Instead of giving precedence to the prevention of interference in criminal cases, as it is done in England, the courts here seem to place emphasis on the importance of free expression.[57] The justification for this appears to stem from the supposition that the law under the Constitution was not intended to be restricted to the rules of the English common law relating to press freedoms, but rather that the Constitution was intended to preclude the government from adopting any form of previous restraint upon publications.[58] Nonetheless, for many years our courts exercised the authority to punish the publishing of a statement out of court as an indirect contempt[59] where the act complained of was "calculated to impede, embarrass, defeat, or obstruct the administration of courts of justice."[60] In 1907, Mr. Justice Holmes said that if a court regards a publication as "tending toward interference" with its administration of justice, it could punish those responsible for the publication.[61] It has been said that the power to punish for contempt is an inherent judicial power,[62] "as old as the laws themselves,"[63] which is not

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[53]See MacLatchy, *supra* note 49, at 277.

[54]See Laski, *Procedure for Constructive Contempt in England*, 41 Harv. L. Rev. 1031 (1928).

[55]See The Queen v. Gray, *supra* note 36.

[56]Goodhart, *supra* note 28, at 910.

[57]Comment, U. Chi. L. Rev. 540, 541 (1950).

[58]See Grossjean v. American Press Co., 297 U.S. 233, 249 (1936).

[59]See, *e.g.*, *In re* Sturoc, 48 N.H. 428 (1869). For an excellent outline of the history of the contempt power as it relates to publications, see Nelles and King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 401, 409-431 (1928).

[60]Durham v. State, 97 Miss. 549, 52 So. 627 (1910); see, *e.g.*, State v. Edwards, 15 S.D. 383, 89 N.W. 1011, 1012 (1902); *cf.* People v. Wilson, 64 Ill. 195, 212 (1872).

[61]See Patterson v. Colorado, *supra* note 6, at 463.

[62]See, *e.g.*, *Ex parte* Adams, 25 Miss. 883, 885 (1853).

[63]Watson v. Williams, 36 Miss. 331, 341 (1858).

dependent upon, and cannot be restricted by, an act of the legislature.[64]

Operating under this view of judicial power, early courts found that certain types of out-of-court statements did constitute interference with the processes of justice and were, therefore, contemptuous; among these were: newspaper statement reflecting in opprobrius terms upon the prosecution,[65] publication attempting to influence deliberation of the court on a case brought before it on suggestion of error,[66] article which cast dispersions upon court officials and grand jury,[67] publication of facts not admissible as evidence,[68] a libelous article against a judge,[69] and an article describing a pending indictment as being the result of a conspiracy.[70] In a case where an article that was published two days before trial assumed to state the evidence available, commented on the evidence improperly, commented on the merits of the case, and tended to intimidate witnesses who might have supported the defendant's case, the court decided that such comments amounted to contempt.[71] The court reasoned that the failure of the jurors to read the articles did not constitute a defense since the sentiment created could contaminate unduly the impartial nature of the trial by influencing prospective witnesses.[72] It has also been held that neither the truth of the statement made,[73] lack of intent to pervert the course of justice,[74] nor lack of knowledge of the contemptuous statement,[75] can serve as a valid defense. As indicative of the position of the courts in regard to the influencing of juries by the news media, the Massachusetts court stated:

> The publication of an article in a newspaper which is printed and circulated in the place where a trial is had, pending the trial, and which concerns the cause on trial, and is calculated to prejudice the jury in the cause and prevent a fair trial, . . . [is] a criminal contempt of the court trying the cause.[76]

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[64]See, *e.g.*, Bradley v. State, 111 Ga. 168, 36 S.E. 630 (1900).

[65]*In re* Sturoc, *supra* note 59.

[66]People v. Wilson, *supra* note 60.

[67]*In re* Cheeseman, 49 N.J.L. 115, 6 Atl. 513 (1886).

[68]Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N.E. 445 (1899).

[69]Myers v. State, 46 Ohio St. 473, 22 N.E. 43 (1889).

[70]Dale v. State, 198 Ind. 110, 150 N.E. 781 (1926).

[71]State v. Howell, 80 Conn. 668, 69 Atl. 1057 (1908).

[72]*Id.* at 69 Atl. 1059.

[73]Dale v. State, *supra* note 70, at 150 N.E. 786.

[74]See, *e.g.*, Van Dyke v. Superior Court, 24 Ariz. 508, 211 Pac. 576, 587 (1922); *cf.* Lancaster v. State, 208 Ark. 212, 186 S.W.2d 673, 674 (1945).

[75]Kilgallen v. State, 192 Ind. 531, 132 N.E. 682, 686 (1921).

[76]Telegram Newspaper Co. v. Commonwealth, *supra* note 68, at 52 N.E. 446.

In the *Bridges* case,[77] the Supreme Court reviewed for the first time a state's exercise of the power to punish as contempt the publishing of an out-of-court statement.[78] The Court overturned a state contempt citation on the facts by saying that the editorials in question would not tend to obstruct justice;[79] and it was further suggested that the "reasonable tendency" test was not enough to justify a restriction of free expression.[80] In a later case the Court adopted the rule that the questioned statement must amount to a "threat of clear and present danger to the impartiality and good order of the courts."[81] This position was narrowed further in *Craig v. Harney*.[82] Recently, it was said that the statement must create a clear and present danger of a substantive evil which constitutes an extremely serious and imminent threat to the administration of justice before punishment of the act will be permitted in view of the first amendment's protections.[83]

It should be noted that a distinction exists between statements which might tend to influence a jury that is to deliberate on a case[84] and those which might influence the performance of a judge.[85] In the former case the state courts will be free to decide for themselves what limit the prescribed test sets on their power to restrict press comment.[86]

Prior to 1941, the federal courts exercised the authority to punish for the making of statements out of court which interfered with the course of justice.[87] This practice was sanctioned by the Court[88] even though there existed a statute which prohibited the punishing of any act by summary proceeding unless it occurred in the presence of the court "or so near thereto as to obstruct the administration of justice."[89]

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[77]Bridges v. California, 314 U.S. 252 (1941).

[78]See Wood v. Georgia, 370 U.S. 375, 383 (1962).

[79]See 314 U.S. 278.

[80]314 U.S. 273.

[81]Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

[82]331 U.S. 367, 373 (1947) where it was stated that the statement must amount to "a serious and imminent threat to the administration of justice."

[83]Wood v. Georgia, 370 U.S. 375, 384 (1962).

[84]Baltimore Radio Show v. Maryland, 193 Md. 300, 67 A.2d 497, (1949), *cert. denied*, 338 U.S. 912 (1950).

[85]*E.g.*, Pennekamp v. Florida, 328 U.S. 331 (1946).

[86]See Note, 59 YALE L.J. 534, 538 (1950); *cf.* People v. Gholson, 412 Ill. 294, 106 N.E.2d 333, 338 (1950), where the court said that an act would be contemptous if it was an attempt to influence or intimidate the court and jury.

[87]See, *e.g.*, *In re* Independent Publishing Co., 240 Fed. 849 (9th Cir. 1917); United States v. Sullens, 36 F.2d 230 (S.D. Miss. 1929).

[88]See Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[89]See 18 U.S.C. §§ 401-02.

This position was reversed by the decision in *Nye v. United States*,[90] which held that the contemptuous act must occur in the vicinity of the court as required by the statute.[91] Although there is some authority for the continued viability of the clear and present danger test in the federal courts,[92] a more accurate appraisal of the law would indicate that the federal courts must follow the strict dictates of the statute.[93]

The result is that there now can be no conviction for an indirect or constructive contempt in the federal courts.[94] This means that no matter how flagrant the abuse by the news media of the criminal defendant's right to a fair trial, the federal courts will not be able to restrict such comment under the threat of summary punishment for contempt.

B. New Trial

It has been obvious that the sparingly used contempt power has not appreciably lessened the incidence of prejudicial information that appears on television and in the newspapers. The courts, therefore, will, under certain circumstances, invalidate a proceeding that has been contaminated by the effects of unrestrained statements by the news media to which the members, or prospective members, of juries have been subjected. The power of the printed word in newspapers to influence jurors in their deliberations was recognized by the Supreme Court in a case in which a new trial was ordered where the bailiff read a newspaper article to a deadlocked jury which was injurious to the defendant, whereupon a guilty verdict was rendered.[95] In another case the Mississippi Supreme Court reversed a conviction and ordered a new trial where there was evidence that the jurors had read a newspaper article in the jury room which enumerated charges against the defendant for other crimes.[96] But the fact that jurors have read newspaper articles about the case is not sufficient reason in itself to grant a new trial,[97] nor will it necessarily be reversible error to allow a juror to qualify for jury duty where he admits to having formed an opinion of the defendant's guilt or innocence from prior publicity.[98] The mere oppor-

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[90]313 U.S. 33 (1941).

[91]*Id.* at 52-53. *Contra, In re* Independent Publishing Co., *supra* note 87, at 857 where it was said that the "misbehavior is committed where it takes effect."

[92]See Smotherman v. United States, 186 F.2d 676, 679 (10th Cir. 1950).

[93]See Note, *supra* note 86, at 539.

[94]Note, 48 VA. L. REV. 556, 556-57 (1962).

[95]See Mattox v. United States, 146 U.S. 140 (1892).

[96]See Sprinkle v. State, 137 Miss. 731, 102 So. 844 (1925).

[97]See, *e.g.*, Bratcher v. United States, 149 F.2d 742, 746 (4th Cir. 1945), *cert. denied*, 325 U.S. 885 (1945).

[98]See, *e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

tunity for prejudice to infect the minds of jurors does not raise a presumption that it does in fact exist.[99] In order to declare that there was a denial of due process, the Supreme Court will attempt to determine whether there was a denial of fundamental fairness, and further whether the absence of this fairness fatally infected the trial.[100]

It was not until the *Irvin* case was decided in 1961[101] that the Supreme Court had ever reversed a state court conviction solely because of the prejudicial effects of publicity prior to trial.[102] Before the rendition of this decision, however, state courts had recognized that pre-trial publicity was a menace to a fair trial and could cause bias and prejudice against an accused which would require invalidation of the proceeding. In a case where a prospective juror had read accounts in the newspaper and believed the pending case to be unfavorable to the defendant, it was reversible error for the trial court to permit him to participate in the decision of the case since he said that evidence would be needed to remove his opinion. The juror had stated that he was not the type to make up his mind from newspaper reports and that he would try to lay aside his opinion and try the defendant on the evidence.[103] In the case of *People v. Hryciuk*,[104] which involved a conviction for rape, newspaper articles were published during the trial which indicated that the defendant had confessed to two murders for which he would later be tried, and it was also stated that he had boasted of "attacks on more than fifty women." In response to questioning by the judge the next day, some jurors admitted reading the articles. The court concluded that it would be unnatural for one to read the articles and not desire to see the person described severely punished and that denial of influence on the part of jurors should not be considered conclusive. A new trial was ordered.[105]

It has been held, however, that the forewarning of a jury not to read newspaper accounts of the case and not to give any weight to the stories will be sufficient to safeguard the accused's right to a fair trial, at least in the absence of a showing that the jury was probably influenced by such accounts.[106] Prejudice must be affirmatively shown, even though the circumstances indicate that the jurors probably were

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[99]Holt v. United States, 218 U.S. 245, 251 (1910).

[100]See Lisenba v. California, 314 U.S. 219 (1941).

[101]Irvin v. Dowd, 366 U.S. 717 (1961).

[102]Manes, *Irvin v. Dowd: Retreat From Reality*, 22 LAW IN TRANSITION 46 (1962).

[103]People v. Miller, 125 Cal. 44, 57 Pac. 770, 771 (1899).

[104]52 Ill. 2d 176, 125 N.E.2d 61 (1954).

[105]*Id.* at 125 N.E.2d 64-66.

[106]See Hatton v. Stott, 220 Mich. 262, 189 N.W. 850 (1922).

influenced by the statements in the news.[107] The test is one of law and fact which involves an assessment of the nature and strength of the prejudice to determine if it is such as to render the jury impartial.[108]

In a recent case local law enforcement officials "interviewed" an accused, and a sound film of the "interview" was shown over television for three days. The film actually showed an interrogation of the accused during which he confessed to the charges of robbery, kidnapping, and murder. Mr. Justice Stewart stated that in the Court's opinion there was a denial of due process of law since the people of the parish had been exposed "repeatedly and in depth to the spectacle of Rideau [the accused] personally confessing in detail to crimes with which he was later to be charged. . . . Any subsequent court proceeding in a community so pervasively exposed to such a spectacle could be but a hollow formality."[109] In another case it was said:

> It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, . . . a statement, unsworn to, unseen, uncross-examined and uncontradicted, . . . conveyed by the press to the jury.[110]

Although the courts will protect the accused by reversing a conviction which is rendered by a prejudiced tribunal, in some cases it may be necessary for counsel to exhaust the remedies available to him in the trial court before he can complain of the prejudice that is alleged to have existed in the lower court. In a case where all of the available peremptory challenges are not used and no motions are made for a change of venue or continuance, the court may refuse to grant a new trial.[111]

A reversal of a conviction may be easier to obtain in federal court in view of the supervisory power of the Supreme Court to formulate and apply proper standards for the enforcement of criminal law.[112] In one case that involved considerable publicity prior to trial, no motion

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[107]Stroble v. California, 343 U.S. 181 (1952); see Gicinto v. United States, 212 F.2d 8, 10-11 (8th Cir. 1954).

[108]See Irvin v. Dowd, *supra* note 4 at 723; *but see* Oxenberg v. State, 362 P.2d 893, 899 (Alaska 1961), *cert. denied,* 368 U.S. 56 (1961) where the test was said to be whether it is *likely* that the verdict was affected.

[109]Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

[110]Shepherd v. Florida, 341 U.S. 50, 52 (1951), (concurring opinion); noted, 26 N.Y.U.L. Rev. 513 (1951).

[111]See, *e.g.*, United States v. Rosenberg, 200 F.2d 666 (2d Cir. 1952), *cert. denied,* 345 U.S. 965 (1953). But the failure to make such motions is not "dispositive of the issue." Stroble v. California, *supra* note 107, at 194.

[112]See Marshall v. United States, 360 U.S. 310 (1959). See also United States v. Weber, 197 F.2d 237, 239 (2d Cir. 1952), *cert. denied,* 344 U.S. 834 (1952).

was made for continuance and no juror admitted to having a clear recollection of publicity which was published three months prior to the trial, yet the court stated that "if this had been a federal trial and jurors had admitted to reading contemporaneous reports of defendant's criminal record, our supervisory power over the administration of federal justice would compel us to reverse."[113] It appears that it is not necessary for the federal courts to find that there has been a denial of due process in order for the conviction to be reversed. If it can be shown that the publicity was prejudicial and it did in fact interfere with the fair trial, there is opportunity to obtain a reversal.[114]

C. Habeas Corpus

Relief may also be available to a defendant who is claiming to have been deprived of his right to a fair trial in the form of a writ of habeas corpus. It is usually held, however, that relief cannot be obtained unless the remedies available to the defendant under state law are exhausted.[115] It has been said that where petitioner failed to move for a change of venue or for a continuance at the trial he is not entitled to relief under habeas corpus.[116] But, in a more recent case the fact that there were no motions for continuance or change of venue made during trial did not prevent the petitioner from reaching the federal courts.[117]

This mode of relief presents obvious problems to an accused. The proceedings are usually time-consuming and often result in prohibitive expense. It has also been rejected as a suitable means of relief because of the "procedural tangle."[118]

D. Voir Dire and Challenges

One writer has observed that the only real protection that our system of justice accords a criminal defendant whose rights have been transgressed by the news media is the opportunity to select a jury.[119]

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[113]United States v. Smith, 306 F.2d 596, 603 (2d Cir. 1962). *Compare* Griffin v. United States, 295 Fed. 437 (2d Cir. 1924), *with* Massicot v. United States, 254 F.2d 58 (5th Cir. 1958), *cert. denied*, 358 U.S. 816 (1938). See also United States v. Denno, 313 F.2d 364 (2d Cir. 1963), *cert. denied*, 372 U.S. 978 (1963).

[114]See Janko v. United States, 281 F.2d 156 (8th Cir. 1960), *rev'd per curiam*, 366 U.S. 716 (1961).

[115]See United States v. Denno, *supra* note 113.

[116]See Palakiko v. Harper, 209 F.2d 75, 97 (9th Cir. 1953).

[117]Geagan v. Gavin, 292 F.2d 244, 246 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1963).

[118]See Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. Rev. 810, 823-824 (1961).

[119]See Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J. 800, 845 (1953).

But since a juror cannot be challenged for cause merely because he has formed an opinion of the accused's guilt from adverse publicity,[120] evidence must be adduced to show that his opinion is so strong that proof would be required to dispell his convictions before the denial of the challenge by the judge will amount to an abuse of discretion.[121] Although this safeguard is of some value in the empanelling of an impartial jury, its effectiveness is drastically reduced when the circumstances resemble those in the *Irvin*[122] and *Denno*[123] cases, where almost all the prospective jurors had formed opinions of the defendant's guilt from reading about the case in the newspapers and watching television reports. It has been said that to exclude from the panel all those who have read and heard about the case would be to "reduce the jury to the blind, the deaf and the illiterate."[124]

E. Interrogations, Instructions, and Isolation

At the beginning of a criminal trial there is little that a judge can do to erase the impressions that may have already been created in the minds of the jurors. But pending the rendition of a verdict, there are means whereby the right of the defendant to an impartial trial can be protected. Cautioning the jury at the beginning that they are not to read newspaper accounts of the case or watch television reports may be held to be sufficient to ensure a fair trial where there has been no showing that the jury was actually influenced by such reports.[125] Of course, in the event that the jurors have already been subjected to these stories before the trial begins, this instruction will come too late.[126]

When the trial lasts more than one day or when there is a recess during which the jury is allowed to disperse rather than remain isolated, the general admonition that was given to the jury at the beginning of the trial may be insufficient. It has been held to be a duty of the court in such cases to instruct the jury "not to read newspaper articles about the case, and not to listen to radio or television reports concerning the case during the recess of the court."[127] In a case where the jury was exposed to prejudicial publicity each night during the trial it was held to be reversible error for the judge to neglect to call the attention

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[120]*E.g.*, Reynolds v. United States, *supra* note 98.

[121]See, *e.g.*, People v. Miller, *supra* note 103.

[122]*Supra* note 101.

[123]*Supra* note 113.

[124]Rifkind, *When the Press Collides with Justice*, 34 J. Am. Jud. Soc'y 46, 48 (1950).

[125]See Hatton v. Stott, *supra* note 106.

[126]See Rifkind, *supra* note 124, at 51.

[127]Atlanta Newspapers Inc. v. State, 216 Ga. 399, 116 S.E.2d 580, 582 (1960).

of the jurors frequently to the fact that they were not to subject themselves to news accounts of the proceedings.[128]

If during the trial prejudicial matters are circulated by the news media and the jurors have had the opportunity to observe them, the courts require that an examination of the jury be conducted to determine whether the news accounts actually caused prejudice.[129] If the judge is satisfied that prejudice has not been caused and if he cautions the jury not to accept the information in the news accounts as evidence, this will be sufficient to preserve the fairness of the trial.[130] The purpose of the inquiry is to determine whether the jurors were improperly influenced.[131] Where there is the opportunity during the trial for the jurors to be influenced by publicity, it may be an abuse of discretion, which constitutes reversible error, for the judge to fail to poll the jury and interrogate them to see if the publicity caused prejudice.[132] In the event that there is no interrogation by the judge, however, counsel may be required to show that the jurors actually were prejudiced before the action of the judge will be held to be an abuse of discretion.[133]

The questioning of the jury must be fair, for if the judge's questions are intimidating or designed to obtain from the jurors negative replies to his inquiries into the possibility of prejudice, such an interrogation may constitute reversible error.[134]

Unless cautioning instructions are effective, "criminal trials in the large metropolitan centers may well prove impossible."[135] It cannot be certain, however, that instructions to the jury are effective. Even judges are not convinced that any useful purpose is served by their use: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[136]

F. Continuance and Change of Venue

Under unique circumstances it may be possible for a criminal defendant to reduce the effects of pre-trial publicity by obtaining a

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[128]United States v. Accardo, 298 F.2d 133 (7th Cir. 1962).

[129]See, *e.g.*, United States v. Pisano, 192 F.2d 355 (7th Cir. 1951); Annot., 31 A.L.R. 2d 417 (1953).

[130]*Id.* at 361.

[131]See Welch v. United States, 135 F.2d 465 (D.C. Cir. 1943), *cert. denied*, 319 U.S. 769 (1943).

[132]See Marson v. United States, 203 F.2d 904 (6th Cir. 1953).

[133]See Gicinto v. United States, *supra* note 107.

[134]See Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959).

[135]United States v. Leviton, 143 F.2d 848 (2d Cir. 1951), *cert. denied*, 343 U.S. 946 (1952).

[136]Krulewitch v. United States, 336 U.S. 440, 453 (1949).

continuance where it can be shown that the public prejudice will probably lessen.[137] Since the granting of a continuance is a matter left largely to the discretion of the trial judge,[138] courts will be hesitant to overrule the determination of the judge that extra-courtroom publicity was not a threat to a fair trial.[139]

It is provided by statute in most states that on a showing of public prejudice the judge may change the venue to a convenient county.[140] In one case, Mr. Justice Jackson said: "[I]f freedoms of press are so abused as to make a fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence."[141] A motion for change of venue is left, however, to the discretion of the trial judge, and in the absence of abuse of discretion, the denial is not error.[142] The denial of the motion may be considered reversible error by the appellate court if it clearly appears that the defendant could not receive a fair trial due to reasons of local prejudice.[143]

Whether a change of venue would actually be effective to protect the accused's right to a trial by an impartial tribunal is doubtful. The motion was made in one case because of alleged prejudice resulting from radio broadcasts and newspaper stories, but the court denied it since it felt that any section of the country would have been subjected to the same news releases.[144] In view of the fact that the modern methods of dissemination of news articles and broadcasts result in virtual saturation of a state, if not the United States, a change of venue would be ineffective in most circumstances.[145]

G. Professional Canons of Ethics

Although it is true that the news media are guilty of failing to appreciate their responsibility to the judicial system, the legal profession itself has a duty, which has been recognized but neglected, to ensure that its members refrain from activity which sometimes stokes the fires of sensationalism. Attorneys have at times tended to use the

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[137]See Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

[138]Ellis v. State, 198 Miss. 804, 23 So. 2d 688 (1945).

[139]See Delaney v. United States, *supra* note 137, at 115.

[140]See, *e.g.*, MISS. CODE ANN. § 2508 (1956).

[141]Shepherd v. Florida, 341 U.S. 50, 52-53 (1951) (concurring opinion).

[142]*E.g.*, Kersten v. United States, 161 F.2d 337, 339 (10th Cir. 1947), *cert. denied*, 331 U.S. 851 (1947).

[143]See, *e.g.*, State v. Sisson, 58 R.I. 200, 192 Atl. 209, 210 (1937).

[144]Shockley v. United States, 166 F.2d 704 (9th Cir. 1948), *cert. denied*, 334 U.S. 850 (1948).

[145]See Forer, *supra* note 119, at 845.

criminal case as a "vehicle for personal publicity."[146] "[O]nly where the public interest really dictates should any party to the judicial process become a party to the publicity process as well."[147]

> At present there is a governing provision in the Canons of Ethics: Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.[148]

The profession has the machinery available to impose sanctions among its membership through local and national committees, but apparently there has been no effective action taken.

H. Other Alternatives

Since it is the prejudice of a jury that constitutes the threat to a fair trial, it would be possible to eliminate the threat by waiving trial by jury. It has been suggested that an impartial trial could be had before a judge even though the community has been deluded with inflammatory news items because the judge is supposedly less influenced by such stories.[149] But in the federal courts, the prosecution and the court must consent to such a waiver.[150] It seems that the better view would be that the right to be tried by a jury is a right that belongs solely to the accused. It should not be objectionable to allow him the privilege of waiving the jury if he feels that it would be advantageous to do so.

The practice of empanelling "blue-ribbon" juries could reduce the effects of prejudicial publicity since these jurors would probably be less susceptible to out-of-court influence.[151] This alternative may have some merit. It is not an uncommon supposition that judges are men of character and dedication who are not easily prejudiced by inflammatory publicity against an accused. The same may apply to superior jurors.

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[146]Wessel, *Controlling Prejudicial Publicity in Criminal Cases*, 48 J. Am. Jud. Soc'y 105, 107 (1964).

[147]*Ibid.*

[148]Canon 20, Canons of Professional Ethics of the American Bar Association. This same provision has been adopted in Mississippi: see Canon 20, 5 Miss. L.J. 90 (1932).

[149]See Goldfarb, *supra* note 118, at 831-32.

[150]See Patton v. United States, 281 U.S. 276 (1930).

[151]See Goldfarb, *supra* note 118, at 822.

It has not been consonant with the prevailing view of unrestricted freedom of press and speech to draft laws which would provide for punishment of irresponsible reporting. However, there is a federal statute that makes punishable any written communication to jurors designed to influence the decision on any issue or matter pending.[152] To obstruct justice is an indictable offense under the common law,[153] and in some states such activity is made an offense by statute.[154] But it does not appear that any of these prohibitions have been extended to deter prejudicial publicity in a criminal case, although it has been held that activity which would constitute a constructive contempt would be indictable under the Mississippi statute.[155]

V. Proposed Solutions

It is generally recognized that the situation which exists today that permits unbridled publicity to prejudice the trial of an accused cannot be permitted to endure. The need for reform is manifest, and the legal profession would be remiss in its duty to the public if it failed now to accept responsibility in this area and take positive action to ensure that the criminal defendants in the United States will be tried in the future in the courtrooms on evidence admitted in court.

It is not uncommon to find some among the profession who desire an enlargement of the contempt power. As an example of the strong feelings that this subject can engender, one writer was moved to recommend the adoption of

> a judicial rule which would *conclusively presume* that the publication of *any* report, news item, comment, editorial, picture or cartoon concerning a pending criminal case, the evidence pertaining thereto, or the person or persons suspected or accused of committing the offense in question, obstructs, interferes with and delays the administration of justice, [and that the] offending news medium, together with its publisher, owner and/or editor [be held in contempt of court and punished].[156]

Judging from the recent decisions of the Supreme Court, however, such a rule would probably be held unconstitutional if adopted by any state court since the constitutional provisions are said to protect the infringement of freedom of press except where the statements create an extremely serious and imminent threat to the administration of justice.[157] To

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[152]18 U.S.C. § 1504.

[153]Johnson v. McMillion, 178 Ky. 707, 199 S.W. 1070 (1918).

[154]See, *e.g.*, Miss. Code Ann. § 2294 (1956).

[155]See Sullens v. State, 191 Miss. 856, 869, 4 So. 2d 356, 361 (1941).

[156]Manes, *supra* note 102, at 57.

[157]See, *e.g.*, Wood v. Georgia, 370 U.S. 375 (1962).

enlarge the scope of the contempt power in the federal courts, it would be necessary for Congress to act.[158]

Undoubtedly the utilization of the contempt power by the courts would result in a great reduction in the amount of encroachment by the news media. It would probably be the most effective way to protect the constitutional rights of an accused from "an overzealous press."[159] But, to suppress completely the news reports of police and judicial activity would be harmful to society generally. While the sanctions of the law would be imposed directly on the news media, our society would be deprived of information relevant to the efficiency of law enforcement officials, anxiety of the citizens would be aroused by the lack of accounts of arrests and solved crimes, and police officials would be deprived of a useful resource in attempts to apprehend fugitives and warn the public of their whereabouts.[160] It seems, therefore, that such an all-inclusive measure would be more detrimental than beneficial to the cause of improving the administration of justice.

The use of the contempt power, however, might serve a good purpose where it is directed to irresponsible behavior of officers of the court. As indicated before, the attorneys and law enforcement officials are sometimes as much to blame for the publication of prejudicial information prior to trial as the news media. Percy Foreman has said that having an accused confess on television prior to the trial "ought to be a criminal offense."[161]

Senator Wayne Morse of Oregon has introduced in the United States Senate a bill which would amend the Criminal Code to provide for the punishment of certain parties under the contempt power of the federal courts. This bill is designed to curb the release of information for publication which might affect a pending criminal case:

> It shall consitute a contempt of court for any employee of the United States, or for any defendant or his attorney or the agent of either, to furnish or make available for publication information not already properly filed with the court which might affect the outcome of any pending litigation, except evidence that has already been admitted at the trial. Such contempt shall be punished by a fine of not more than $1,000.[162]

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[158]See 18 U.S.C. §§ 401-02.

[159]McEvoy & Newman, *Free Press; Fair Trial—Rights in Collision,* 34 N.Y.U.L. REV. 1278, 1279 (1959).

[160]See Note, 59 YALE L.J. 534, 541 (1950).

[161]Address by Percy Foreman, University of Mississippi School of Law, Nov. 11, 1964. See also Griswold, *When Newsmen Become Newsmakers,* Saturday Review, Oct. 24, 1964, pp. 21, 23.

[162]S. 290, 89th Cong., 1st Sess. (1965).

There should be no objection to this proposed law. If properly and vigorously applied by the courts, it should alleviate the need to impose harsh restraints upon the news media.

Of course, this bill would have no effect on state or local authorities. It restricts only the release of information by the defense, the prosecution, and the law enforcement officials in federal cases. Since this measure is felt to be a meaningful step toward improving criminal justice, it is recommended that the states adopt similar legislation.

If the mentioned bill is passed by the Congress, and if there is not sufficient cooperation on the part of the newspapers and broadcasters, a second bill should be proposed to restrict the matter that is publishable generally. It should be apparent to the Supreme Court that in some circumstances a certain amount of restriction of the freedom of the press may be necessary to accord competing interests the recognition they are unquestionably due. A law that confines the publishable information to a description of the crime committed, the fact that persons have been arrested on suspicion of committing the crime, the fact of the indictment, and a fair and accurate report of the proceedings at the trial, would be sufficient to safeguard the interest of the accused in a fair trial and protect the citizens' right to be informed of the activity of law enforcement officials and the judiciary. While the news media would be restricted somewhat, the restriction is not so severe that it could be fairly claimed to be oppressive. "The doctrine of freedom of the press is not for the benefit of the press but for the benefit of the people."[163]

Such an extension of the power of the courts would not be required, however, if the publishers, editors, and broadcasters would assume the responsibility of restricting their reports to the information set forth above. Although it is thought by some that only the courts can control irresponsible reporting,[164] there is evidence that the newsmen are aware of their responsibility to protect the administration of justice. Columnist Henry Mitchell recently wrote:

> Whether or not the accused are vermin, whether or not they are guilty, whether or not the crime has rattled the teeth of a continent is not strictly our business at the moment, since we have courts to decide verdicts. What is very much our business at the moment is to see to it that we do our part toward making a fair trial possible.[165]

The fact that such sentiments are being expressed by the employees of

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[163]United States v. Powell, 171 F. Supp. 202, 205 (N.D. Cal. 1959).

[164]See Hallan, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 477 (1940).

[165]The Commercial Appeal, Mar. 29, 1965, p. 25, col. 3 (Mississippi ed.).

the news media is encouraging, but there has been little indication that the practice of voluntary restraint will become widespread. It would be possible for the legal profession to contribute toward this goal by encouraging editors, publishers, and broadcasters to participate in seminars and institutes that are sponsored by the various bar associations and law schools.

At Northwestern University, for instance, a course was begun in 1959 under the sponsorship of the schools of law and journalism which attempts to illuminate the problem of crime and publicity, and this course has been expanded into an annual program.[166] A similar institute at Vanderbilt University was held recently which was sponsored by the Vanderbilt Law School, Sigma Delta Chi Journalistic Society, the Tennessee Bar Association, and the Tennessee Association of Broadcasters.[167] Similar programs at other educational institutions would serve to reconcile the conflict between a free press and the right to a fair trial.

The bar associations could assist directly in this endeavor by utilizing their committees or offices of Continuing Legal Education. It has also been recommended that the bar associations extend invitations to editors, publishers, and broadcasters to select representatives who would join representatives of the Bar and the Bench in the formation of a committee for the purpose of arriving at some workable standard to govern the publicity in criminal cases.[168] It might also be helpful for the bar association to establish a watch-dog committee of its own members which would communicate with the press and broadcasters whenever it was thought that publicity was encroaching upon the established standards.[169] While it may be that the absence of any real sanctions would impair the effectiveness of any voluntary standard,[170] the mere fact that the editors, publishers, and broadcasters would be advised of the necessity of restrictive measures and made aware that the legal profession desires to work with them rather than against them would make the attempt worthwhile.

The bar associations should also ensure that the members of the legal profession understand that Canon 20 condemns the release of information for publication that concerns a case pending before the courts. Apparently this provision has been all but ignored in the past, and until there is legislation passed which extends the contempt power to permit the punishing of offending attorneys and officers of the court, grievance

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166See Mueller, *Problems Posed by Publicity to Crimes and Criminal Proceedings*, 110 PA. L. REV. 1, 25 (1961).

167The Commercial Appeal, Mar. 14, 1965, p. 16, col. 3 (Mississippi ed.).

168See Rifkind, *supra* note 124, at 5-52.

169*Ibid.*

170See McEvoy & Newman, *supra* note 159, at 1296.

committees should enforce this standard by cautioning, and punishing when necessary, attorneys who disregard this canon. It has been observed that trial by newspaper is a "disease that does not cure itself."[171] Others have recognized that probably the most desirable way to begin the effort to cure the disease is the adherence by attorneys to Canon 20.[172]

VI. Conclusion

In 1948, Whitney North Seymour, in an address before the New York State Bar Association, stated that while there had been proposals to deter the trial of cases in the newspapers, "nothing has been done about it."[173] Following the sensational publicity that surrounded the trial and conviction of Bruno Hauptmann in 1935, a committee was appointed to make recommendations to the American Bar Association as to what steps could be taken to help preserve the dignity of court proceedings. In their report the committee said that "the trial of a criminal case is a business that has for its sole purpose the administration of justice, and it should be carried on without distracting influences."[174] Recently, the Warren Commission submitted its report on the investigation that was made into the facts and circumstances surrounding the assassination of President Kennedy. That report contains the following recommendation:

> The Commission recommends that the representatives of the bar, law enforcement associations, and the news media, work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.[175]

In accordance with the recommendation of the Commission, the President of the American Bar Association named Justice Paul C. Readon of the Supreme Judicial Court of Massachusetts to serve as chairman of an Advisory Committee on Fair Trial–Free Press.[176] This advisory group will participate in the formulation of minimum standards for the administration of criminal justice.[177]

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[171]Perry, *The Courts, The Press, and The Public*, 30 Mich. L. Rev. 228, 231 (1931).

[172]See, *e.g.*, McEvoy & Newman, *supra* note 159, at 1296.

[173]71 N.Y.S.B.A. Rep. 206, 210 (1948).

[174]*Recommendations of Special Committee on Ways of Curbing Excessive Publicity in Connection with Criminal Trials*, 22 A.B.A.J. 79 (1936).

[175]Report of the Warren Commission on the Assassination of President Kennedy 47 (1964).

[176]News from the American Bar Ass'n Committee on Public Relations, Dec. 6, 1964, p. 1.

[177]*Ibid.*

It is unfortunate and regrettable that the past efforts of bar associations and committees have produced so few tangible improvements in the publicity surrounding criminal cases. Our system of criminal justice and the guarantees of the Constitution contemplate fairness to those brought before the courts and freedom of expression for the newspapers and broadcasters. The courts have attempted to protect the accused through the use of procedural safeguards from the prejudice that can be created by the news media. As a practical matter, however, these measures cannot in most instances ensure a fair trial for an accused when the public has been saturated with emotional accounts of the crime, descriptions and pictures of the "evidence" available, statements of "witnesses," prophesies of strategy and outcome by counsel, and the like.

The only real protection that would in fact be worthwhile is the elimination of prejudicial publicity. This might be achieved by passing laws that would extend the contempt power. Legal sanctions may not be required, however, if the legal profession and the news media will be diligent in the endeavor to formulate and follow mutually satisfactory standards that will govern the publicity in the criminal case.

W. Thad Cochran

THE SUDDEN EMERGENCY DOCTRINE

I. Introduction

It is the purpose of this comment to examine the peculiarities of the doctrine of sudden emergency, the requisite elements of the doctrine, and the limitations upon its use. Factual sketches will be used to relate the doctrine to its practical significance. The final section will deal with the essential elements of a sudden emergency instruction as required by the Supreme Court of Mississippi.

The sudden emergency doctrine, which is often referred to as the doctrine of imminent peril, the doctrine or rule of sudden peril, or simply as the emergency doctrine, is used most often in connection with personal injury claims arising from automobile accidents. For this reason more emphasis will be given to that area. In various instances it will be pointed out that the sudden emergency doctrine is not applicable. This does not necessarily mean that the actor's conduct is negligent, but that he must resort to some theory other than the emergency doctrine to show his freedom from negligence. It is not within the scope of this comment to examine other theories upon which the actor could rely in the event he finds that the emergency doctrine is not available.

II. Definition

Even to the layman, the use of the words *sudden* and *emergency* in conjunction necessarily connotes an unanticipated and unforeseen event or condition, arising in the twinkling of an eye, which calls for instantaneous action in order to avert an undesirable result. A sudden emergency, as contemplated by the law of torts, has been defined as "an event or combination of circumstances which calls for immediate action without giving time for deliberate exercise of judgment or discretion."[1] The courts, in recognizing that a person suddenly placed in a dangerous and perilous position cannot be expected to exercise the same calm judgment and foresight as is demanded of individuals under normal circumstances, have formulated and applied the doctrine. Thus it is said that an actor who is suddenly confronted with an emergency, not arising through any fault of his own, without sufficient time in which to weigh alternative courses of action, may, to avoid harm to himself or another, act in the way the emergency seems to require without being guilty of negligence, even if he does not make the wisest choice, provided he exercises such care as a reasonably prudent man would use under the unusual circumstances.[2]

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[1]Virginia Transit Co. v. Durham, 190 Va. 979, 59 S.E.2d 58, 66 (1950).

[2]See Blashfield, Cyclopedia of Automobile Law and Practice §§ 668-70 (1948); 2 Harper & James, Torts § 16.11 (1956); Prosser, Torts 171-73 (3d ed. 1964) [hereinafter cited as Prosser]; Restatement, Torts §§ 296, 470 (1934).

This brief statement of the doctrine is easy enough to comprehend, but, as in all other fields of the law, it is the application of the doctrine to a given set of facts which presents difficulty. In order to facilitate further discussion it is desirable to enumerate the individual elements of the doctrine: (1) an emergency actually or apparently existed;[3] (2) the actor was aware of the emergency;[4] (3) the emergency was not created by the actor's own tortious conduct;[5] (4) there were alternative courses of action open to him;[6] (5) he did not have time for the deliberate exercise of judgment or discretion;[7] (6) after the emergency arose he exercised such care as a reasonably prudent person would have used under the same or similar circumstances;[8] and (7) an injury was the result of the choice made.[9] The first six of these elements will be given individual attention in subsequent sections of this comment.

III. History

One writer feels that the earliest intimation of the sudden emergency doctrine "is perhaps traceable to the famous *Squib* case."[10] While it is true that the two intermediate actors in that case were not held liable for their actions in disposing of the lighted squib, it is not necessary to torture this ancient case into any new position of glory. It is interesting to note that Justice Blackstone, in his dissent, made the observation that the acts of these two parties in throwing the squib across the market instead of extinguishing it or throwing it to a place of safety "was at least an unnecessary and incautious act."[11]

The case which gave birth to the doctrine of sudden emergency was *Jones v. Boyce*.[12] Here, there was an action against a coach proprietor for operating the coach in such a negligent manner that the plaintiff was obliged to leap from the coach, thereby injuring himself. The court's charge to the jury, which encompassed basically the elements of the doctrine as we know it today, read partially as follows:

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[3]See notes 21-29 *infra* and accompanying text.

[4]See notes 30-33 *infra* and accompanying text.

[5]See notes 34-51 *infra* and accompanying text.

[6]See notes 52-57 *infra* and accompanying text.

[7]See notes 58-64 *infra* and accompanying text.

[8]See notes 65-79 *infra* and accompanying text.

[9]In order to support a cause of action based upon negligence actual loss or damage must occur. Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 108 So. 2d 409 (1959); Prosser 165-66.

[10]Evans, *The Standard of Care in Emergencies*, 31 Ky. L.J. 207, 208 (1943), referring to Scott v. Shepard, 2 W. Bl. 892, 96 Eng. Rep. 525 (K.B. 1773).

[11]Scott v. Shepard, 2 W. Bl. 892, 96 Eng. Rep. 525, 527 (K.B. 1773) (Blackstone, J., dissenting).

[12]1 Stark. 493, 171 Eng. Rep. 540 (N.P. 1816).

> To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger, which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. . . . [D]id this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril.[13]

The first case involving the doctrine in the United States was *Stokes v. Saltonstall.*[14] Here, there was also an action against the owner of a stage coach, involving a very similar factual situation. The court quoted with favor the rule laid down in the earlier *Jones* case. Together these two cases laid the foundation for the future application of the doctrine. In both of these cases the doctrine was invoked by the plaintiff to show that his conduct did not amount to contributory negligence, and this was true of almost all cases in the infant stages of the doctrine. It appears that in the earlier years of the doctrine it was a device through which the courts allowed the plaintiff to prevail in an era where recovery of damages for negligence was unlikely if the slightest amount of questionable conduct was attributable to the complaining party.

The plaintiff did not retain private dominion over the doctrine; before the turn of the twentieth century it was also being used by the defendant as a defense to the charge of primary negligence. Subject to slight authority to the contrary[15] the defense could invoke the doctrine whether the emergency was created by the injured party or by some outside force. Today it is uniformly accepted that the doctrine is available to either party to an action, whether the emergency was created by the negligence of the other party or by some other force over which neither party exercised any control.

Although no survey has been made by this writer, the cases seem to indicate that in the majority of jurisdictions it is still the plaintiff who most frequently seeks the protecting shelter of the doctrine. However, this is not true in Mississippi, where the defendant has used the doctrine in the great majority of the reported cases. Could it be that more impetus is provided for the use of the doctrine on behalf of the

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[13]171 Eng. Rep. at 541.

[14]38 U.S. (13 Pet.) 161 (1839).

[15]See, *e.g.*, O'Rourke v. Lindell R.R., 142 Mo. 342, 44 S.W. 254 (1898).

plaintiff in jurisdictions where contributory negligence acts as a complete bar, whereas in Mississippi contributory negligence has been substituted by the more compatible comparative negligence formula?

IV. Purpose and Use

Stated simply, the sudden emergency doctrine is a device through which the law gives recognition to the frailties of human nature. In this respect the doctrine occupies a laudable position in our social pattern, for society has not yet reached the stage where machine-like precision is demanded of every individual regardless of the perplexities of the occasion or the emotional excitement which ordinarily accompanies danger or the threat of danger. It will be conceded that when a person is suddenly placed in a position of danger, with little time to exercise all of his mental faculties, he may not act as prudently as he would have had he had time for mature deliberation. "The law takes account of the impulses of humanity when placed in dangerous and hazardous positions and does not expect thoughtful care from the persons whose lives are thus endangered."[16] It must be remembered that hindsight is not available to one suddenly placed in an emergency situation, and if it were, the doctrine would lose its reason for existence. It might be said that the purpose of the doctrine is to excuse an act or omission which, under ordinary circumstances, would constitute negligence.

As mentioned, the doctrine is available to both the defendant and the plaintiff.[17] It is used by the plaintiff to show that his conduct did not constitute such negligence as would diminish or preclude his recovery. The defendant will endeavor to use the doctrine as a defense to the charge of primary negligence. The emergency may be created by the negligence of the plaintiff, in which case the defense would seek to invoke the doctrine; it may be created by the negligence of the defendant, giving the plaintiff an opportunity to use the doctrine; or it may be created by a third person[18] or some other force over which neither party exercised any control,[19] in which case the doctrine would be used by either the defendant or the plaintiff, depending upon which party was faced with the emergency situation. While the doctrine is referred to as a defense to the charge of negligence, technically, it is

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[16]Elmore v. Des Moines City Ry., 207 Iowa 862, 224 N.W. 28, 31 (1929).

[17]Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958); Pennington's Adm'r v. Pure Milk Co., 279 Ky. 235, 130 S.W.2d 24 (1939).

[18]See Vasatka v. Matsch, 216 Minn. 530, 13 N.W.2d 483 (1944); Hersey v. Fritz, 91 N.H. 484, 22 A.2d 770 (1941).

[19]Heerman v. Burke, 266 F.2d 935 (8th Cir. 1959) (emergency created by a wasp); Olson v. Hermansen, 196 Wis. 614, 220 N.W. 203 (1928) (emergency created by dogs).

not a defense, but only one of the circumstances to be considered in determining whether the actor's conduct was negligent.[20]

V. The Individual Elements of the Doctrine

A. An Emergency Must Actually or Apparently Exist.

It is elementary to the application of the doctrine of sudden emergency that there be substantial evidence to support a conclusion that an emergency actually or apparently existed.[21] Though it is somewhat superficial to segregate this segment of the doctrine from the whole, it is clear that a sudden emergency instruction should not be granted if, at the outset, there is no conflict as to the nonexistence of an emergency situation.[22] However, if there is a conflict as to the presence or absence of an emergency, the issue should be properly submitted to the jury.[23] The Vermont court stated the problem as follows:

> [T]he question is not whether a perilous situation in fact existed, but rather whether 'it would have appeared to an ordinarily prudent person,' situated as the plaintiff was, that a perilous situation existed. . . . It is enough that the plaintiff's appraisal of the situation was such as an ordinarily prudent person would have made in the same circumstances.[24]

In *Squires v. McLaughlin*,[25] the defendant's car was in a private driveway when the plaintiff opened the right-hand door and reached for her bottle of vodka, which was lying on the front seat. As she did so, the defendant, who was in the driver's seat, lunged for the bottle. His foot slipped from the clutch pedal and the car moved backward, thereby injuring the plaintiff. The defendant sought to use the sudden emergency doctrine to excuse his conduct. The court held that trying to retain a bottle of vodka which belonged to someone else did not give rise to a sudden emergency. On the other hand, courts have held

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[20]*E.g.*, Rohde v. St. Louis Pub. Serv. Co., 249 S.W.2d 417 (Mo. 1952).

[21]Hooper v. Bronson, 123 Cal. App. 2d 243, 266 P.2d 590 (1954) (either actual presence or appearance of imminent danger); Dupree v. Pitts, 159 So. 2d 904 (Fla. App. 1964); Schwartz v. Hibdon, 174 Neb. 129, 116 N.W.2d 187 (1962); Hebert v. Stanley, 201 A.2d 698 (Vt. 1964): The sudden emergency doctrine presupposes the presence of a sudden peril.

[22]Herzberg v. Knight, 289 Mich. 29, 286 N.W. 145 (1939); Trudeau v. Sina Contracting Co., 241 Minn. 79, 62 N.W.2d 492 (1954) (It must first be determined that a real peril existed.); Hill v. Bardis, 96 N.H. 14, 69 A.2d 1 (1949).

[23]Heerman v. Burke, 266 F.2d 935 (8th Cir. 1959); Dupree v. Pitts, 159 So. 2d 904 (Fla. App. 1964); Warnke v. Essex, 217 Md. 183, 141 A.2d 728 (1958); Reilley v. Byard, 146 W. Va. 292, 119 S.E.2d 650 (1961).

[24]Slate v. Hogback Mountain Ski Lift, Inc., 122 Vt. 8, 163 A.2d 851, 854-55 (1960).

[25]44 Wash. 2d 43, 265 P.2d 265 (1953).

that an emergency existed where the driver of an automobile was stung by a wasp,[26] where a child suddenly darted from behind a parked automobile,[27] where an automobile came over the crest of a hill in the wrong lane,[28] and where an automobile suddenly emerged from a private driveway.[29] However, the mere existence of an emergency, of itself, is not enough to excuse the actor's conduct. The other elements of the doctrine must also be satisfied.

B. The Actor Must Be Aware of the Emergency.

Since the underlying purpose of the sudden emergency doctrine is to excuse a person's mistake of judgment when he is faced with an impending peril or danger, it is obvious that there can be no situation to which the doctrine can be applied unless the actor appreciates the fact that he is in a place of danger.[30] Thus, even if an emergency did in fact exist, an emergency instruction should not be granted on behalf of one who was unaware of its existence. In such a situation it is apparent that the actor could not have made an effort to avoid the impending peril. This point is well illustrated by *Hanson v. Matas*.[31] There, an exceedingly deaf man was standing in the highway when the front of a truck, which approached him from the rear, brushed his clothing. Instead of jumping away from the truck, he turned toward it and the protruding body of the truck struck and injured him. The court held that he was not entitled to an emergency instruction since he acted without being aware that he was in an emergency.

Similarly, it has been held that where one becomes aware of the emergency too late to take any affirmative action to avoid the accident, the emergency doctrine does not apply.[32] However, an emergency instruction has been allowed where the interval of time between the realization of the emergency and the happening of the accident was extremely short, leaving little opportunity for the actor to take any real preventative action.[33] In those cases it appears that the actors at least

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[26]Heerman v. Burke, 266 F.2d 935 (8th Cir. 1959).

[27]Dupree v. Pitts, 159 So. 2d 904 (Fla. App. 1964).

[28]Majure v. Herrington, 243 Miss. 692, 139 So. 2d 635 (1962).

[29]Uhl v. Fertig, 56 Cal. App. 718, 206 Pac. 467 (1922).

[30]Hormovitis v. Mutual Lumber Co., 120 So. 2d 42 (Fla. App. 1960); Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958); Dimmick v. Follis, 123 Ind. App. 701, 111 N.E.2d 486 (1953); Frost v. Stevens, 88 N.H. 164, 184 Atl. 869 (1936).

[31]212 Wis. 275, 249 N.W. 505 (1933).

[32]Nahhas v. Pacific Greyhound Lines, 153 Cal. App. 2d 91, 313 P.2d 886 (1957); Healy v. Moore, 108 Vt. 324, 187 Atl. 679 (1936).

[33]Connor v. Pacific Greyhound Lines, 104 Cal. App. 2d 746, 232 P.2d 500 (1951); Minder v. Peterson, 254 Minn. 82, 93 N.W.2d 699 (1958); Otero v. Physicians & Surgeons Ambulance Serv., 65 N.M. 319, 336 P.2d 1070 (1959).

took some measure of affirmative action in an effort to avoid the accident or lessen its effect. It is submitted that the granting of an emergency instruction, where the time elapsing between the realization of the emergency and the happening of the accident is insufficient to allow the actor to take some measure of affirmative action to avoid the accident, is not in harmony with the true purpose of the sudden emergency doctrine.

C. The Emergency Must Not Be Created by the Actor's Own Tortious Conduct.

The emergency doctrine is not available to the actor if the emergency was created in whole or in part by his prior negligence.[34] A condition precedent to the application of the doctrine is that one who seeks its benefit must have used due care to avoid meeting the emergency.[35] To allow an actor to escape liability where his conduct created the emergency would be to reward one for his own negligence.[36] In such case it is not the actor's mistake of judgment after the emergency arose which is not excused, but his prior negligence; and if there is a question of last clear chance involved, the actor may still not be liable.[37]

The following are examples of acts or omissions which have precluded resort to the doctrine: driving at an excessive rate of speed;[38] driving with defective brakes;[39] following another vehicle too closely;[40] switching lanes on a four lane highway without first ascertaining if movement into the other lane could be made with safety;[41] approaching a small boy on a bicycle without diminishing speed or giving warning;[42] and a driver's loss of control when he attempted to wipe

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[34]Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942); Independent Oil Ref. Co. v. Lueders, 17 La. App. 154, 134 So. 418 (1931); Casey v. Siciliano, 310 Pa. 238, 165 Atl. 1 (1933). See RESTATEMENT, TORTS § 296, comment *a* (1934: "The fact that the emergency is created by the actor's own conduct does not prevent the rule from being applicable if his conduct is not tortious."

[35]Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So. 2d 902 (1951); Rohde v. St. Louis Pub. Serv. Co., 249 S.W.2d 417 (Mo. 1952).

[36]Seitner v. Clevenger, 68 So. 2d 396 (Fla. 1953).

[37]PROSSER 172-73. *But see* Price, *Applicability of the Last Clear Chance Doctrine in Mississippi,* 29 MISS. L.J. 247 (1958), where the author comes to the conclusion that the last clear chance doctrine would serve no useful purpose under Mississippi's system of comparative negligence.

[38]Ladner v. Merchants Bank & Trust Co., 171 So. 2d 503 (Miss. 1965).

[39]Fink v. East Miss. Elec. Power Ass'n, 234 Miss. 221, 105 So. 2d 548 (1958); Allen v. Schultz, 107 Wash. 393, 181 Pac. 916 (1919).

[40]Gregory v. Thompson, 160 So. 2d 195 (Miss. 1964); Continental So. Lines v. Klaas, 217 Miss. 795, 65 So. 2d 575 (1953).

[41]Cipriani v. Miller, 160 So. 2d 87 (Miss. 1964).

[42]Moak v. Black, 230 Miss. 337, 92 So. 2d 845 (1957).

mist off the windshield with one hand and drive with the other.[43] An example of the erroneous granting of a sudden emergency instruction where the actor was guilty of creating the emergency, is well illustrated by *Pullen v. Nabors*.[44] There, on a dark night, the defendant was approaching the scene of a prior accident. He was intoxicated and driving at an exceedingly reckless rate of speed. When he was approximately 600 yards from the accident, he saw a policeman waving a red flashlight, but he proceeded nonetheless without reducing his speed. When he realized there was a wrecked car in the highway, he turned to the right and hit a car parked on the side of the road and then collided with the car involved in the previous accident. An emergency instruction was given and the jury found for the defendant. This was, of course, reversed.

In addition, the courts hold that some emergencies must be anticipated.[45] If an actor engages in an activity in which an emergency is likely to arise, he must be prepared to meet it.[46] This is especially applicable to automobile drivers. Thus, a greater degree of care is required by one who is crossing a railroad track[47] or one who is passing in front of a school house or playground.[48] An automobile driver is expected to be more alert when driving in a crowded city on a rainy night than when driving in sunny daylight over a flat highway in uninhabited country.[49] An automobile driver cannot ignore conditions which he knows to exist and then be relieved of the responsibility with which he is charged under the law by claiming that the known condition was an emergency.[50] That which is foreseeable is not a sudden emergency.[51]

D. There Must Be Alternative Choices of Action.

After it has been ascertained that an emergency existed through no fault on the part of the actor and that he was aware of its existence, it must next be determined whether there were alternative courses of action open to him.[52] That is, did the actor have a choice between

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[43]Blaxom v. McCoy, 178 Va. 343, 17 S.E.2d 401 (1941).

[44]240 Miss. 864, 128 So. 2d 117 (1961).

[45]PROSSER 173.

[46]*Ibid.*

[47]Lunzer v. Pittsburg & L.E. R.R., 296 Pa. 393, 145 Atl. 907 (1929).

[48]See Ratcliffe v. Speith, 95 Kan. 823, 149 Pac. 740 (1915).

[49]See Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942).

[50]Ladner v. Merchants Bank & Trust Co., 171 So. 2d 503 (Miss. 1965).

[51]See Jones v. Boston & M.R.R., 83 N.H. 73, 139 Atl. 214 (1927).

[52]Dupree v. Pitts, 159 So. 2d 904 (Fla. App. 1964); Frost v. Stevens, 88 N.H. 164, 184 Atl. 869 (1936); RESTATEMENT, TORTS § 296, comment *b* (1934): "Therefore, the court and jury in determining upon the propriety of the actor's

doing an act or refraining from acting in an effort to avoid the impending injury? If it appears that there were no alternative courses of action open to the actor[53] or that there was no opportunity to have taken any action to avoid the injury,[54] a sudden emergency instruction should not be granted. In such case the injury would have been inevitable, leaving no room for the application of the sudden emergency doctrine. It will be noted that this element of the doctrine is closely related to the requirement that the actor must be aware of the emergency, for if the actor does not realize the emergency exists, the requirement of alternatives is also absent. An application of the doctrine when this element is not present would tend to defeat the basic purpose of the doctrine, which is to excuse a mistake of judgment in the face of a perilous situation. There can be no mistaken judgment if there is no choice between alternatives which call for the exercise of such judgment. Even though a person is confronted with a sudden emergency, this does not relieve him of the duty to try to avoid the accident.[55]

An emergency instruction was denied where the plaintiff hit a small patch of ice in the highway and skidded into a telephone pole. The court held that the sudden emergency doctrine was not available since there was no alternative to avoid the ice and subsequent skidding.[56] Where an automobile driver observes a boy on a bicycle emerge from a stop street too late to avoid hitting him, the proper defense would be predicated on the theory that the accident was unavoidable as to the driver, not on the premise of the sudden emergency doctrine.[57]

E. There Must Be No Time for the Deliberate Exercise of Judgment or Discretion.

With some fear of repetition it is necessary to emphasize the fact that the emergencies we are dealing with must be sudden or imminent. The use of the adjective "sudden" in the name of the doctrine is no

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conduct must take into account the fact that he is in a position where he must make a speedy decision between alternative courses of action and that, therefore, he has no time to make an accurate forecast as to the effect of his choice."

[53]Corridan v. Agranoff, 210 Minn. 237, 297 N.W. 759 (1941) (emergency instruction denied where the actor could not have changed his course regardless of the emergency situation); Frangos v. Edmunds, 179 Ore. 577, 173 P.2d 596 (1946) (emergency instruction denied where the actor's only choice was to put on his brakes).

[54]Nahhas v. Pacific Greyhound Lines, 153 Cal. App. 2d 91, 313 P.2d 886 (1957); Hanson v. Matas, 212 Wis. 275, 249 N.W. 505 (1933).

[55]Pennington's Adm'r v. Pure Milk Co., 279 Ky. 235, 130 S.W.2d 24 (1939); Lundgren v. Kieren, 393 P.2d 625 (Wash. 1964).

[56]Vachon v. Ives, 150 Conn. 452, 190 A.2d 601 (1963).

[57]See Murchison v. Sykes, 223 Miss. 754, 78 So. 2d 888 (1955).

superflous frill or window dressing. It serves to qualify the type of emergencies contemplated by this doctrine of tort law. Not all emergencies are sudden, and only those which are, fall within the scope of the doctrine. With this qualification in mind, it is obvious that the sudden emergency doctrine is available only if the danger is imminent and if there is an absence of opportunity for mature deliberation.[58] A few courts emphasize the quality of "instinctive action" which normally accompanies the emergency situation,[59] while most merely require that there be no time for the deliberate exercise of judgment, so that the choice between alternatives must be made quickly, based largely upon impulse or guess.[60] If an actor has sufficient time to consider the situation before taking action, the doctrine is not applicable.[61] In such case, his conduct would more properly be judged in the light of ordinary circumstances rather than emergency circumstances.

In cases involving a sudden emergency it will normally appear that excitement and confusion accompany the perilous situation in varying degrees, depending upon the individual involved.[62] It has been said that the presence of fright and confusion have become so associated with the doctrine that there is a question as to whether one who is perfectly calm can invoke its benefit.[63] In at least one case,[64] however, it was held that the actor could not be deprived the use of the doctrine merely because he was not excited at the time but acted in a calm and deliberate manner. While calmness in the face of a

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[58]Horton Motor Lines, Inc. v. Currie, 92 F.2d 164 (4th Cir. 1937); Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958); Weaver v. Sibbett, 393 P.2d 601 (Idaho 1964); Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So. 2d 902 (1951); Hilzer v. Farmers Irr. Dist., 156 Neb. 398, 56 N.W.2d 457 (1953).

[59]Hercules Powder Co. v. Crawford, 163 F.2d 968 (8th Cir. 1947); Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942); Hormovitis v. Mutual Lumber Co., 120 So. 2d 42 (Fla. App. 1960); Collette v. Boston & Me. R.R. 83 N.H. 210, 140 Atl. 176 (1928).

[60]Horton Motor Lines, Inc. v. Currie, 92 F.2d 164 (4th Cir. 1937); Louisville & N.R.R. v. Wright, 193 Ky. 59, 235 S.W. 1 (1921); Lemay v. Springfield St. Ry., 210 Mass. 63, 96 N.E. 79 (1911); Frangos v. Edmunds, 179 Ore. 577, 173 P.2d 596 (1946); PROSSER 171-72.

[61]Hercules Powder Co. v. Crawford, 163 F.2d 968 (8th Cir. 1947); Feck's Adm'r v. Bell Line, Inc., 284 Ky. 288, 144 S.W.2d 483 (1940); Kaestner v. Milwaukee Auto. Ins. Co., 254 Wis. 12, 35 N.W.2d 190 (1948).

[62]See Alabama Great So. R.R. v. Hunt, 204 Ala. 504, 86 So. 100 (1920); Elmore v. Des Moines City Ry., 207 Iowa 862, 224 N.W. 28 (1929); Majure v. Herrington, 243 Miss. 692, 139 So. 2d 635 (1962); Vann v. Tankersley, 164 Miss. 748, 145 So. 642 (1933); State v. Cloud, 150 Miss. 697, 116 So. 814 (1928); Donahue v. Kelly, 181 Pa. 93, 37 Atl. 186 (1897); Hughes v. Oregon Improvement Co., 20 Wash. 294, 55 Pac. 119 (1898).

[63]Evans, *The Standard of Care In Emergencies*, 31 KY. L.J. 207, 209 (1943).

[64]Triestram v. Way, 286 Mich. 13, 281 N.W. 420 (1938).

sudden emergency should not, of itself, preclude the application of the doctrine, it is submitted that where it appears that the actor was in no way disturbed or excited by the dangerous situation, his conduct should be the object of careful examination and scrutiny.

F. The Actor's Conduct After the Emergency Has Arisen Must Be Reasonable Under the Unusual Circumstances.

The standard of care in actions based upon negligence is ordinarily measured in terms of the proverbial question: What would a reasonably prudent person have done under the same or similar circumstances?[65] The emergency doctrine provides no exception to this general rule.[66] The test is still the same. The existence of an emergency is simply one of the circumstances in the light of which the actor's conduct must be judged.[67] The rule requiring reasonable care is sufficient to take into consideration the excitement and confusion which normally accompany the emergency situation.[68] While it is said that one confronted with a sudden emergency is not held to the same degree of care as one who had an opportunity to deliberate,[69] this does not mean that any different standard is to be applied than in negligence cases generally. Some courts have spoken in terms of the application of a lower or diminished standard of care in emergencies.[70] However, it is clear that they are not referring to the standard itself, but rather to the amount of care required because of the unusual circumstances.

If the other elements are present, the sudden emergency doctrine will preclude the taint of negligence from attaching to the actor if he acted as an ordinarily prudent man would have acted under the circumstances, even if it appears that he did not make the wisest choice[71]

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[65]See James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1 (1951).

[66]Fruehauf Trailer Co. v. Gusewelle, 190 F.2d 248 (8th Cir. 1951); Gravel v. Roberge, 125 Me. 399, 134 Atl. 375 (1926); Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So. 2d 902 (1951).

[67]Dean v. Travelers Ins. Co., 171 So. 2d 708, 709 (La. App. 1965) (reference to "sudden emergency" serves to emphasize "under the circumstances"); Jones v. Boston & Me. R.R., 83 N.H. 73, 139 Atl. 214 (1927).

[68]Hormovitis v. Mutual Lumber Co., 120 So. 2d 42 (Fla. App. 1960); Collette v. Boston & Me. R.R., 83 N.H. 210, 140 Atl. 176 (1928).

[69]Hull v. Laine, 127 Fla. 433, 173 So. 701 (1937); Ritter v. Johnson, 163 Wash. 153, 300 Pac. 518 (1931).

[70]Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So. 2d 902 (1951); Goolsbee v. Texas & N.O. R.R., 150 Tex. 528, 243 S.W.2d 386 (1951).

[71]Tate v. Collins, 266 Ky. 322, 98 S.W.2d 928 (1936); Klas v. Frenske, 248 Wis. 534, 22 N.W.2d 596 (1946).

or exercise the best judgment.[72] Consideration is given to the fact that hindsight is not available to one so situated.[73] Judge Holmes explained it succintly when he said, "A choice may be mistaken yet prudent."[74] Thus, the failure to exercise the best judgment in a sudden emergency will not, of itself, constitute negligence unless it is shown that the actor was unfit to act in an emergency[75] or that the choice made was so hazardous that the ordinarily prudent man would not have made it under similar circumstances.[76]

A study of the cases reveals that in many instances an actor has been excused through the aid of the doctrine for conduct which would have otherwise constituted contributory or primary negligence on his part. Abandoning a burning car which was loaded with nitroglycerine on a steep hill without first securing the brakes was held not to amount to negligence under the circumstances. The fire started through no fault of the driver, and he fled the scene for fear that the nitroglycerine would explode because of the heat.[77] In *Vann v. Tankersly*,[78] the defendant was slowly backing his car away from a curbing when the door on the right-hand side suddenly came open and his wife, who was beside him, began to fall from the car. He became greatly excited and seized her, holding her on the car's running board. The car gained speed and proceeded backward in a 260 degree circular route, striking a building and injuring the plaintiff. The court, in answering the question of whether the defendant acted as a person of reasonable prudence would have acted under the circumstances, said that the first impulse of every normal man would be to protect his wife from harm; and since the defendant did not create the emergency, under the circumstances, his conduct was not unusual or negligent. One of the best illustrations of excused conduct is presented by *Elmore v. Des Moines City Ry.*[79] At night, the plaintiff was alighting from the defendant's

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[72]Hunt v. Jones, 14 La. App. 520, 130 So. 138 (1930); Polonfsky v. Dobrosky, 313 Pa. 73, 169 Atl. 93 (1933).

[73]St. Johnsbury Trucking Co. v. Rollins, 145 Me. 217, 74 A.2d 465 (1950).

[74]Kane v. Worcester Consol. St. Ry., 182 Mass. 201, 65 N.E. 54 (1902).

[75]Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942); Collette v. Boston & Me. R.R., 83 N.H. 210, 140 Atl. 176 (1928).

[76]Dean v. Travelers Ins. Co., 171 So. 2d 708 (La. App. 1965) (It was held unreasonable in the face of a sudden emergency to release the steering wheel and abandon the operation of the vehicle.); Lemay v. Springfield St. Ry., 210 Mass. 63, 96 N.E. 79 (1911): The sudden emergency doctrine does not necessarily excuse the actor from any error in judgment, but his conduct is to be judged in view of the exigency and the need for immediate action.

[77]Barnhardt v. American Glycerine Co., 113 Kan. 136, 213 Pac. 663 (1923).

[78]164 Miss. 748, 145 So. 642 (1933).

[79]207 Iowa 862, 224 N.W. 28 (1929).

bus. As she stepped down to the ground the bus, without warning, lurched backward and then began to move forward, turning into the plaintiff. When this happened the plaintiff lost her balance and, as the bus moved into her, she pushed against the side of the bus to keep from falling. She then grabbed the bumper of the bus and was dragged three-quarters of a mile. In the confusion and excitement she was afraid to let go because she could see the headlights of a car behind her. An emergency instruction was given, and the jury returned a verdict for the plaintiff. In affirming the judgment, the court said that if the defendant created the peril, it cannot be heard to question the discretion of the plaintiff's act.

VI. Application of the Doctrine in Mississippi

The cases reveal that the sudden emergency doctrine has presented somewhat of a problem in Misssisippi from the standpoint of both the erroneous granting of emergency instructions, when as a matter of law the doctrine does not apply, and the granting of instructions which fail to incorporate the essential elements of the doctrine. This is evidenced by the fact that thirteen of the nineteen cases involving the doctrine which have been before the Mississippi Supreme Court in the last decade have been reversed for one of the reasons stated above.

If, at the trial, one of the parties is relying on the sudden emergency doctrine to excuse his conduct and the evidence presents a conflict as to the applicability of the doctrine, the issue should be submitted to the jury under proper instructions of the court.[80] If no such conflict exists, it becomes a question of law to be settled by the court.[81] Although the sudden emergency issue need not be specifically pleaded in order to justify the granting of a sudden emergency instruction,[82] there must be substantial support therefor in the evidence.[83] The court has made it quite clear that it will not hesitate to reverse where an emergency instruction has been given which is not warranted by the particular facts of the case.[84] Not only must the evidence be sufficient to warrant the granting of an instruction based upon the doctrine, but the instruction itself must also correctly state the applicable law. In *Gulf,*

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[80]See Majure v. Herrington, 243 Miss. 692, 139 So. 2d 635 (1962); Carlisle v. Cobb Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918 (1960); Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333 (1958); Vann v. Tankersly, 164 Miss. 748, 145 So. 642 (1933).

[81]*E.g.*, Vann v. Tankersly, 164 Miss. 748, 145 So. 642 (1933).

[82]Phillips v. Dow Chem. Co., 247 Miss. 293, 151 So. 2d 199 (1963).

[83]Fink v. East Miss. Elec. Power Ass'n, 234 Miss. 221, 105 So. 2d 548 (1958); Rivers v. Turner, 223 Miss. 673, 78 So. 2d 903 (1955); Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So. 2d 902 (1951).

[84]*E.g.*, Pullin v. Nabors, 240 Miss. 864, 128 So. 2d 117 (1961).

Mobile & Ohio R.R. v. Withers[85] the court laid down three essential elements which must be incorporated by one who requests such an instruction:

> (1) He must have used reasonable care before the emergency arose, and it was not one of his own creation or making; (2) define and describe briefly the sudden emergency, stating the facts which, the jury might decide warranted a finding of sudden emergency; and (3) after the sudden emergency arose, he must exercise such care as a reasonably prudent and careful person (capable driver) would use under the unusual circumstances.[86]

It is desirable at this point to consider each of these requirements individually.

A. Conduct Before the Emergency Arose

One must remember that a condition precedent to the use of the sudden emergency doctrine is that the party invoking its aid must have used due care to avoid meeting the emergency. Where no fair inference can be drawn from the evidence other than that the actor did not satisfy this requirement, no emergency instruction should be granted.[87] If the other elements of a sudden emergency are present and there is a conflict as to whether the actor's negligence caused the emergency, an instruction on that issue would be proper. However, if it does not contain the requirement that the emergency must not have been created by the actor's own tortious conduct, it will constitute

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[85]247 Miss. 123, 154 So. 2d 157 (1963).

[86]*Id.* at 132-33, 154 So. 2d at 160.

[87]In the following cases the court held that a sudden emergency instruction was not applicable for the reason that the evidence showed without dispute that the emergency was of the actor's own creation. In Ladner v. Merchants Bank & Trust Co., 171 So. 2d 503 (Miss. 1965), the defendant was driving at an excessive rate of speed even though he knew that the highway was wet and dangerous due to rainy conditions. Kettle v. Musser's Potato Chips, Inc., 162 So. 2d 243 (Miss. 1964); Gregory v. Thompson, 160 So. 2d 195 (Miss. 1964) (following another vehicle too closely); Cipriani v. Miller, 160 So. 2d 87 (Miss. 1964) (switching lanes on a four lane highway without first ascertaining whether such movement could be made with safety); Pullin v. Nabors, 240 Miss. 864, 128 So. 2d 117 (1961). In Fink v. East Miss. Elec. Power Ass'n, 234 Miss. 221, 105 So. 2d 548 (1958), an emergency instruction was held improper where the defendant's brake failure caused the emergency. The court in this case laid down the necessary requisites to sustain an emergency instruction insofar as brake failure is concerned. Moak v. Black, 230 Miss. 337, 92 So. 2d 845 (1957) (emergency instruction held improper where an automobile driver saw a child in the road ahead of him in ample time to have given him an opportunity to take precautions to avoid hitting the child); Continental So. Lines, Inc. v. Klaas, 217 Miss. 795, 65 So. 2d 575 (1953) (following another vehicle too closely).

reversible error.[88] An instruction which omits this is misleading, erroneous, and prejudicial. While it is true that the instructions will be read together and many times an erroneous instruction may be cured by other instructions, the omission of this requirement will not be cured by general instructions requiring the exercise of reasonable care.[89] It may be cured by reading the other emergency instructions if they contain this requirement. In *Rushing v. Edwards*,[90] an emergency instruction was given which set out this requirement by the use of the following language: "A person confronted with a sudden emergency *not of his own making. . . .*"[91] (Emphasis added.) It was contended that the phrase *not of his own making* did not properly present the issue to the jury. The court held that although this phrase was not as precise as it could have been, its use could not have misled the jury. However, there were three other emergency instructions which set forth additional definitions and limitations on the sudden emergency doctrine. To avoid any possibility of a problem, it is submitted that this part of the instruction could have read: "not caused in whole or in part of the fault (negligence) of the actor" or "not proximately caused by the fault (negligence) of the actor."

B. The Instruction Should Define the Sudden Emergency

The instruction should contain a brief but accurate definition of a sudden emergency and relate this definition to the facts being relied on in support thereof. Prior to the *Withers* case, the court held that even though it constituted error for a sudden emergency instruction to be given without such definition, this error alone would not justify reversal.[92] To resolve any doubt as to the validity of the instruction, this requirement should be complied with, especially in view of the fact that the court in the *Withers* case stated that this was one of the three essential elements of a sudden emergency instruction. An acceptable definition seems to be that a sudden emergency is a sudden and unexpected event or combination of circumstances which calls for immediate action without giving time for the deliberate exercise of judgment or discretion, and which could not have been foreseen by a reasonably prudent man under the same or similar circumstances. This may be changed or abbreviated to meet the need of the occasion. The definition used should be the one which most closely relates the doctrine to the

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[88]Crump v. Brown, 246 Miss. 631, 151 So. 2d 822 (1963); Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 50 So. 2d 902 (1951).

[89]*Ibid.*

[90]244 Miss. 677, 145 So. 2d 695 (1962).

[91]*Id.* at 682-83, 145 So. 2d at 697.

[92]Crump v. Brown, 246 Miss. 631, 151 So. 2d 822 (1963).

facts of the particular case. Elsewhere in the instruction or in other sudden emergency instructions this definition should be linked to the factual contentions which are being relied upon in support of the instruction.

C. Conduct After the Emergency Arose

The very heart of the sudden emergency doctrine, assuming all other elements are present, is concerned with the reaction of the actor after the emergency arose. It must be remembered that even though the doctrine will excuse a mistaken or unwise choice in many instances, it will not automatically do so. In evaluating the actor's conduct after the emergency arose, the question whether he exercised such care as a reasonably prudent and careful person would have used under the unusual circumstances is peculiarly one for the jury. Only in exceptional cases, where there is no conflict in the evidence, is this issue withheld from the jury.[93] Obviously, an instruction which leaves out this third requirement does not properly submit the issue to the jury and is clearly misleading.[94] Otherwise, the person who invokes the aid of the doctrine would only have to prove that he was faced with a sudden emergency which was not proximately caused by his own tortious conduct.

Due to the importance of this feature of the sudden emergency instruction, care should be taken to phrase this requirement, as nearly as possible, in the same language as used by the court in the *Withers* decision. Stating that after the emergency arose the actor "did everything within his power to avoid the collision" is not sufficient to satisfy this requirement.[95] The omission of this requirement cannot be cured by the giving of general instructions which define negligence and set out the general standard of care.[96]

VII. Conclusion

The basic elements of the sudden emergency doctrine and the limitations thereon can be easily stated in a few short sentences. It is equally easy to quickly grasp a general understanding of the doctrine

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[93]Vann v. Tankersly, 164 Miss. 748, 145 So. 642 (1933).

[94]Kettle v. Musser's Potato Chips, Inc., 162 So. 2d 243 (Miss. 1964); Hilton v. Delcher Bros. Moving & Storage Co., 160 So. 2d 694 (Miss. 1964); Gulf, Mobile & Ohio R.R. v. Withers, 247 Miss. 123, 154 So. 2d 157 (1963); Crump v. Brown, 246 Miss. 631, 151 So. 2d 822 (1963); Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333 (1958); Callaway v. Haddad, 226 Miss. 177, 83 So. 2d 825 (1955).

[95]Moore v. Taggart, 233 Miss. 389, 102 So. 2d 333 (1958).

[96]Gulf, Mobile & Ohio R.R. v. Withers, 247 Miss. 123, 154 So. 2d 157 (1963); Crump v. Brown, 246 Miss. 631, 151 So. 2d 822 (1963).

and the purpose it serves. There exists no great schism among the courts as to its application. No one is advocating the abolition of the doctrine or even a slight alteration, and there are no noticeable trends to interpret. Perhaps this manifest simplicity and lack of fertile soil to provide a battleground upon which great legal minds can engage in verbal conflict are the reasons that little has been written in this area of tort law. It is only in the area of instructions that a problem seems to have entered the picture. As mentioned, in Mississippi this problem has manifested itself in two ways—the erroneous granting of sudden emergency instructions where, as a matter of law, the doctrine does not apply, and the granting of instructions which fail to incorporate the applicable law. The problem does not seem to be confined to Mississippi. A recent and very extensive annotation on sudden emergency instructions in American Law Reports[97] verifies the fact that other jurisdictions have also experienced difficulty in this area. If the doctrine is so simple, why have such a great volume of cases involving the doctrine appeared in the appellate courts across the nation? It seems that proper instructions would necessarily follow if practicing attorneys were well informed as to the basic fundamentals of the doctrine. The requirements set forth in the *Withers* case should eliminate much of the problem as far as Mississippi is concerned.

In view of the fact that the Mississippi court has been extremely technical in its requirements for a proper sudden emergency instruction and have shown no hesitancy to reverse in the absence of such requirements, the attorney who drafts an emergency instruction should take great pains to incorporate the essential requirements in such instructions. He should bear in mind that an error in his emergency instructions will not be cured by reading them together with other instructions which define negligence or set forth the general standard of care and that his opponent is not required to submit instructions which impose limitations upon the doctrine. The attorneys and the trial judge should take precautions to see that an emergency instruction is not granted where the facts of the case do not warrant the application of the doctrine.

The Mississippi court has only required two of the six elements of the doctrine initially mentioned as essential to the validity of a sudden emergency instruction. However, it is submitted that the other four elements should also appear in the instruction. For example, in the normal situation the requirements that an emergency actually or apparently existed, and that the actor was aware of its existence can be stated by saying: "If you believe from a preponderance of the evidence that the defendant (plaintiff) was confronted at the time of and immediately prior to the accident with a sudden emergency, etc." The re-

[97]Annot., 80 A.L.R.2d 5 (1961).

quirement of lack of time for the deliberate exercise of judgment or discretion can be inserted by the use of the definition of a sudden emergency which should appear in every emergency instruction. The requirement of alternatives can be introduced when this definition is linked to the facts relied on in support of the instruction.

An attorney who is familiar with the peculiarities of the sudden emergency doctrine and the limitations upon its use will find that it can be a very effective trial tactic, whether he represents the plaintiff or the defendant. If at first glance, the client seems to be negligent, a closer examination of the facts may reveal that the sudden emergency doctrine is applicable, thus absolving him from the taint of negligence.

Virgil G. Gillespie

RECENT DECISIONS

Constitutional Law—Systematic Exclusion of Negroes From Jury Violates Defendant's Rights Under Fourteenth Amendment

The defendant, a Negro, was indicted and tried in the Circuit Court of Scott County of an attempted rape of a sixteen-year-old white girl. Only one Negro served on the grand jury which returned the indictment, and no Negroes were included on the venire which convicted the defendant. According to the 1960 census Scott County had a total population of 21,139 of which 13,050 or 62 per cent were white and 8,089 or 38 per cent were Negroes. Of the approximately 5,200 registered electors in the county only twenty-eight or less than one per cent were Negroes. Evidence showed that between 1954 and the time of the defendant's conviction only nine Negroes were drawn on the venire of the circuit court in Scott County. The defendant was convicted and sentenced to life imprisonment, and from that conviction and sentence he appealed. Held: Reversed and remanded. The long-continued omission of Negroes from jury service establishes a prima facie case of discrimination by systematic exclusion which is not sufficiently refuted by a showing of occasional jury service by Negroes. *Harper v. State*, 171 So. 2d 129 (Miss. 1965).

The Supreme Court has long recognized that state exclusion of Negroes from grand and petit juries solely because of their race denies Negro defendants in criminal cases the equal protection of the laws guaranteed by the fourteenth amendment.[1] This principle has been reaffirmed in a long line of federal decisions, involving instances where the exclusion is effected by statute[2] as well as where manifested in the administration of the jury selection laws by state officials.[3] Such wilful exclusion of Negroes from jury service has been held to deny a Negro defendant the equal protection of the laws no matter how "ingenious" the mechanics of such exclusion.[4] The courts have been quick to make a prima facie case of discrimination where for many years no Negroes, or a disproportionately small number of Negroes, have been selected for jury service in criminal cases, even though they were eligible for such service.[5] Under our system of laws juries are instruments of public justice,[6] and as such, they should be as nearly representative of the community as possible.[7] The requirements of the fourteenth amendment are not met simply because the statutes of a state forbid racial

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[1]See Strauder v. West Virginia, 100 U.S. 303 (1880).

[2]*E.g.*, Bush v. Kentucky, 107 U.S. 110 (1882).

[3]*E.g.*, Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935).

[4]Smith v. Texas, 311 U.S. 128, 132 (1940).

[5]See Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935); Farrow v. State, 91 Miss. 509, 45 So. 619 (1908).

[6]Smith v. Texas, 311 U.S. 128, 130 (1940).

[7]*Ibid.*

discrimination in the selection of juries.[8] Juries must in fact be selected without regard to race, otherwise the constitutional guarantees of a defendant under the fourteenth amendment will have been denied.[9] The constitutional safeguards of the fourteenth amendment have been embodied in a federal statute prohibiting the disqualification of jurors solely on the basis of race.[10] In determining whether or not there was discrimination in the selection of jurors the courts will look to the actual facts of the case rather than to the testimony of the particular officials involved.[11] Where the facts clearly show a long-continued exclusion of qualified Negroes from jury service, the jury selection officials will not be allowed to explain away such exclusion by general assertions that they did not intend to discriminate.[12] Any other rule would render meaningless the constitutional guarantees embodied in the fourteenth amendment.[13] In order to refute the prima facie case of discrimination created by the long-continued absence of Negroes from jury service, jury selection officials must present evidence of a substantial nature which is corroborated by public records.[14] As early as 1908 the Mississippi Supreme Court declared that where a county board of supervisors wilfully omitted the names of qualified Negroes from the list of prospective jurors, any indictment returned by a grand jury drawn from such jury list should be quashed.[15] In a leading case involving Mississippi, the United States Supreme Court declared that in a county in which thirty-five per cent of the adult population was Negro, and no Negro had served on a grand or petit criminal court jury for thirty years, there was a strong inference of systematic exclusion which the state was required to refute.[16] Under the so-called *Patton* rule this inference is not sufficiently refuted by showing that a relatively small number of Negroes meet the requirements of qualified jurors as prescribed by state statute.[17] When the long-continued omission of Negroes from jury service is established, the state must justify such omission as having been brought about for some reason other than racial discrimination.[18] The right of Negro defendants to be tried by juries which include members of their own race has never been recognized as absolute. The fourteenth amendment merely guarantees to a defendant the right to have his case heard by a jury which has been selected without regard to race.[19] No provision of the Constitution requires proportional representation of races on juries.[20] Nor is racial discrimination proved by the fact that no Negroes

[8] *Ibid.*

[9] *Ibid.*

[10] 62 Stat. 696 (1948), 18 U.S.C. § 243 (1958).

[11] Smith v. Texas, 311 U.S. 128, 131-32 (1940).

[12] Norris v. Alabama, 294 U.S. 587, 598 (1935).

[13] *Ibid.*

[14] McGee v. State, 203 Miss. 592, 599, 33 So. 2d 843, 844 (1948).

[15] Farrow v. State, 91 Miss. 509, 45 So. 619 (1908).

[16] Patton v. Mississippi, 332 U.S. 463, 466 (1947).

[17] See Patton v. Mississippi, 332 U.S. 463, 467-68 (1947).

[18] McGee v. State, 203 Miss. 592, 599, 33 So. 2d 843, 844 (1948).

[19] Cassell v. Texas, 339 U.S. 282, 287 (1950).

[20] United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 81 (5th Cir. 1959).

served on a particular jury.[21] The requirements of the fourteenth amendment are met when a jury is fairly selected without regard to race.[22]

At first impression it might appear that the instant case formulates no new rules in regard to the systematic exclusion of Negroes from juries in Mississippi. The court did in fact only adhere to long-established rules which had been laid down in earlier decisions. However, the importance of the present case lies in the fact that for the first time the court is requiring that Negroes, in practice as well as in theory, must not be excluded from juries solely on account of their race. No longer will the court merely pay "lip-service" to the principles embodied in the earlier decisions in this field. This is a direct challenge to the practices which have become prevalent in Mississippi in recent years. Since the decision of the United States Supreme Court in *Patton v. Mississippi*,[23] it is common knowledge that the members of the boards of supervisors in many counties of the State have deliberately placed the names of some Negroes in the jury boxes each year.[24] In the past this has been held sufficient to meet the requirements of the fourteenth amendment. However, under the present decision it appears that in the future such token summoning of Negroes for jury service will not suffice. A good-faith effort must be made on the part of jury commissioners to select jurors with a total disregard of race.[25] Jury selection officials are clearly precluded from purposely including Negroes on grand juries.[26] The federal courts have recently declared that the systematic *inclusion* of Negroes on grand juries does as much violence to the fourteenth amendment as does their systematic *exclusion*.[27] Since this alternative is no longer available, the only apparent solution to the long-range problem may lie in the complete revision of our jury selection laws.

The present decision may well be criticized in that it does not offer any positive plan to local jury selection officials as to how they can properly implement its requirements. The court in effect is saying that in the future more qualified Negroes must be summoned for jury service in Mississippi. But how this is to be done is not made clear. The statutory qualifications of jurors in Mississippi are prescribed in section 1762 of the Mississippi Code.[28] This statute provides objective criteria in the selection of jurors by providing, among other things, that they must be qualified electors. This statute is further qualified by section 1766 which provides that at a yearly meeting of the board of supervisors each supervisor shall present a list of prospective jurors from his district for the coming year.[29] Such prospective jurors are limited to the names of "qualified persons of good intelligence, sound judgment and fair

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[21] *Id.* at 82.

[22] Kennard v. State, 242 Miss. 691, 698, 128 So. 2d 572, 575 (1961).

[23] 332 U.S. 463 (1947).

[24] Cameron v. State, 233 Miss. 404, 415, 102 So. 2d 355, 360 (1958).

[25] Harper v. State, 171 So. 2d 129, 134 (Miss. 1965).

[26] Collins v. Walker, 335 F.2d 417, 420 (5th Cir. 1964).

[27] *Id.* at 434 (Appendix to rehearing).

[28] MISS. CODE ANN. § 1762 (Supp. 1964).

[29] MISS. CODE ANN. § 1766 (Supp. 1964).

character."[30] Here the test becomes solely subjective in nature. The application of these standards is entirely in the hands of the supervisors. They are not required to place in the jury boxes the names of all the Negroes who meet these qualifications, since they are not required to place therein the names of all qualified whites who reside in their districts.[31] Hence, their task is selective. As such, it provides an opportunity for abuse which in many instances may result in the continued exclusion of qualified Negroes from jury service in some counties of the State. This problem might be solved by a revision of the statute which would in effect remove much of the discretion now possessed by the supervisors in the matter of jury selection. Such statutory revision could provide for a strictly objective standard in the selection of prospective jurors, thus eliminating much of the abuse inherent in the present statute with its high degree of subjectivity. An additional alternative may be the enfranchising of a greater number of Negro electors, thereby qualifying them for jury service. As the number of qualified Negro electors is increased, the likelihood of their being selected for jury service likewise increases. This would further tend to reduce the possibility that in counties with a large Negro population a disproportionately small number of Negroes will continue to be called for jury service simply because their qualified voting number is so relatively small as compared to the number of qualified whites. Whatever the ultimate solution should be, the court in the present case is clearly declaring that the practices which have prevailed in the past will not be acceptable in the future when they result in the wholesale exclusion of qualified Negroes from jury service. If the instant case serves no other purpose, it at least demonstrates the extent of the problem which faces jury selection officials in Mississippi today. Under the present system of jury selection it is practically impossible for officials to select a jury which will not be subject to some form of attack by Negro defendants. If an effective system of criminal justice is to continue in Mississippi, some system of jury selection must be devised which is not subject to attack on the ground that it results in the exclusion of any qualified individual or group solely upon racial grounds.

HOWARD OWEN LEACH

CRIMINAL LAW—EXPANDING USE OF HABEAS CORPUS

In 1963 petitioner appealed to the Supreme Court of California from the imposition of a death penalty alleging that certain errors in the penalty trial were prejudicial. The supreme court held that the errors were not prejudicial. Within one year after petitioner's appeal, in other cases the supreme court held the same errors to be prejudicial. On the basis of this change in doctrine, petitioner, having exhausted his appellate review in his earlier appeal, applied for habeas corpus. HELD: Habeas corpus granted to provide petitioner with new penalty trial. Habeas corpus is available to review questions of law that cannot otherwise be presented, and new doctrine of subsequent cases is to be applied retrospectively. *In re Jackson*, 39 Cal. Rptr. 220, 393 P.2d 420 (1964).

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[30] *Ibid.*

[31] Cameron v. State, 233 Miss. 404, 415, 102 So. 2d 355, 360 (1958).

Originally the purpose of the writ of habeas corpus was to release a person restrained of his liberty as a result of a void proceeding or jurisdictional defect,[1] the necessary prerequisites being that of jurisdiction over the person and the subject matter.[2] Historically the purpose and function of the writ has been expanded by enlarging what is comprehended within the term "jurisdiction."[3] Later cases have taken the view that jurisdiction to render the particular order or judgment is essential to its validity,[4] and a judgment or sentence of an entirely different character from that authorized by law is considered void, entitling one restrained of his liberty to be discharged on habeas corpus.[5] The expanding concept of due process has led courts to use the writ not as a test of jurisdiction but to review questions of law that cannot otherwise be reached and are sufficiently important to justify this extraordinary remedy.[6] Once appellate review is exhausted, habeas corpus is the only remedy available to apply a later ruling retroactively.[7] The classic formulation of retroactivity is set forth by Blackstone.[8] This doctrine has been the subject of much discussion and criticism[9] and has been repudiated by eminent jurists.[10] Although nominal allegiance is given the doctrine of retroactivity, its strict application has led to departures in many so-called "exceptions."[11]

The problem of using habeas corpus to reopen a question that has already been determined by applying a later decision retroactively has confronted the federal courts.[12] In a recent decision the second circuit court of appeals decided in favor of retroactivity.[13] Opposing the use of habeas corpus to reopen a question that has already been determined is the view that there would be no finality of judgments. Every judg-

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[1]See, *e.g.*, *Ex parte* Long, 114 Cal. 159, 45 Pac. 1057 (1896); *Ex parte* Max, 44 Cal. 579 (1872).

[2]25 Am. Jur. *Habeas Corpus* § 27 (1940).

[3]See *In re* McInturff, 37 *Cal.* 2d 876, 236 P.2d 574 (1951); *In re* McVickers, 29 Cal. 2d 264, 176 P.2d 40 (1946); Granucci, *Review of Criminal Convictions by Habeas Corpus in California,* 15 Hastings L.J. 189, 198 (1962).

[4]*E.g.*, *Ex parte* Cox, 3 Idaho 530, 32 Pac. 197 (1893).

[5]*E.g.*, *Ex parte* Burden, 92 Miss. 14, 45 So. 1 (1907).

[6]See *Ex parte* Bell, 19 Cal. 2d 488, 493, 122 P.2d 22, 26 (1942); Bowen v. Johnson, 306 U.S. 19, 26-27 (1939).

[7]See Sunal v. Large, 332 U.S. 174, 181 (1947); *In re* Dixon, 41 Cal. 2d 756, 264 P.2d 513, 514 (1953).

[8]1 Blackstone, Commentaries *68-71; Comment, 71 Yale L.J. 907, 908 (1962).

[9]Torcia and King, *The Mirage of Retroactivity and Changing Constitutional Concepts,* 66 Dick. L. Rev. 269 (1962); Comment, 71 Yale L.J. 907 (1962).

[10]See Kuhn v. Fairmont Coal Co., 215 U.S. 349, 371-72 (1910) (dissenting opinion).

[11]Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision,* 18 Colum. L. Rev. 230, 233 (1918).

[12]See Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958).

[13]United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir. 1964).

ment that had been affirmed on appeal would be vulnerable.[14] In *Sunal v. Large*,[15] Mr. Justice Douglas stated that it is not uncommon to find after a trial has ended and the time for appeal has passed that the law has shifted; furthermore, if habeas corpus is used to correct the error, the writ will become a delayed motion for a new trial and the litigation will be interminable. The court in the instant case, in granting the petitioner relief, stated that "the judicial process, once having recognized that prejudicial error occurred in defendant's penalty trial, cannot ruthlessly refuse to stay the death penalty and grant a new penalty trial upon the ground that the court discovered its error too late."[16] In arriving at its conclusion the court seems to have based its decision on the determination that the petitioner had been deprived of due process and granted habeas corpus to correct this denial.

In a comparable Pennsylvania decision, the court stated that where law is unintentionally promulgated which the court later considers unfair, it should be able to correct its earlier error.[17] While finality of judgments and res judicata are important in civil areas, they should be significant in criminal law,[18] only when due process requirements are not met. The American system of government places a high value on individual liberty.[19] The government exists for the individual, and it is important that the individual enjoy all the fruits of liberty irrespective of the time when they ripen.[20] Time alone should not be a factor in determining due process.[21] Anytime it is found that due process has been denied, relief should then be granted to insure that the requirement of due process is met. All persons should have equal rights, and "time" should have no bearing.[22] After having argued the point and exhausted his remedies, a petitioner should not be denied relief when it is later found that due process has been denied.

Arthur E. Ray, Jr.

DESCENT AND DISTRIBUTION—ADULTEROUS SPOUSE ALLOWED TO INHERIT IN THE ABSENCE OF STATUTE OR PROOF OF BIGAMOUS MARRIAGE

Decedent husband and defendant wife were married December 25, 1938, the marriage continuing until June 23, 1962, when terminated by the death of the husband. There was proof that during the years of the marriage the wife committed adultery on more than one occasion. It

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[14]Traynor, *Mapp v. Ohio at Large in the Fifty States*, DUKE L.J. 319, 341 (1962).

[15]332 U.S. 174, 181-82 (1947).

[16]*In re* Jackson, 39 Cal. Rptr. 220, 393 P.2d 420, 425 (1964).

[17]Commonwealth *ex rel.* Leaks v. Myers, 139 LEGALL INTELL. No. 55, p. 1, col. 1 (Phila. C.P., Sept. 8, 1958); Note, 20 U. PITT. L. REV. 703 (1959).

[18]Torcia and King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 DICK. L. REV. 269, 293 (1962).

[19]*Id.* at 289.

[20]*Ibid.*

[21]*Ibid.*

[22]*Ibid.*

appears that the husband condoned the illicit acts for he had knowledge of them, and the record fails to show that he at any time attempted to terminate the marital relation. The couple did not at all times live together, but there was proof that they did, from time to time, stay together, and did so as husband and wife. The chancellor held the acts of adultery prevented the wife from serving as administratrix of decedent's estate and from inheriting from the estate. HELD: Reversed. Wife guilty of adultery is not, in the absence of statute or proof of bigamous marriage, estopped from inheriting the estate of her husband. *Rowell v. Rowell*, 170 So. 2d 267 (Miss. 1964).

The majority rule that misconduct by a surviving spouse will not estop him or her from succeeding to the estate of the deceased spouse was recognized, in part, as early as 1285.[1] More recently the rule has been upheld by the courts of various states, though its application and extension varies somewhat in each jurisdiction.[2] Justification of the rule was expressed in the case of *United States v. McCarty*,[3] where it was said that the statutory law of descent and distribution is not controlled by equitable consideration. Further justification was submitted in another jurisdiction where it was said that the courts have no power to alter the laws of descent, this power belonging exclusively to the legislature.[4] Pennsylvania recognizes the minority rule that adultery will estop the guilty spouse from inheriting, but has provided that condonation of the adulterous acts will re-establish the inheritance rights of the guilty spouse.[5] The Michigan court has held that the wife could inherit the estate of her deceased husband since she had terminated the illicit relation prior to his death, though she had lived with another man for many years, had two children by him, and had given them his name.[6] The court justified this decision by stating that "bigamy means more than the meretricious relation of one who has a husband or wife living. It imports a form or ceremony of marriage by a spouse who has a lawful wife or husband."[7] The Georgia court has allowed a wife to succeed to the estate of her deceased husband, though she had contracted a bigamous marriage.[8] It was reasoned by that court that the bigamous marriage was void, and therefore, could not destroy her inheritance privileges.[9] Generally, it may be said, the misconduct of a surviving spouse will not have the effect of preventing the guilty husband or wife from inheriting the estate of the deceased spouse where the statute of descent and distribution confers inheritance privileges on the surviving

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[1]ATKINSON, WILLS § 37 (1953).

[2]See, *e.g.*, Nolan v. Doss, 133 Ala. 259, 31 So. 969 (1902); *in re* Newman's Estate, 124 Cal. 688, 57 Pac. 686 (1899); Meyer's Adm'r v. Meyers, 244 Ky. 248, 50 S.W.2d 81 (1932); Schmeizl v. Schmeizl, 186 Md. 371, 46 A.2d 619 (1946).

[3]144 F.2d 341, 342 (10th Cir. 1944).

[4]Cox v. Cox, 95 Okla. 14, 217 Pac. 493, 494 (1923).

[5]*In re* Bowman's Estate, 301 Pa. 337, 152 Atl. 38 (1930).

[6]*In re* Dettman's Estate, 195 Mich. 231, 161 N.W. 836 (1917).

[7]*Id.* at 837.

[8]Brown v. Parks, 169 Ga. 712, 151 S.E. 340 (1930).

[9]*Ibid.*

spouse and no exception is made for such misconduct.[10]

In Mississippi, if a husband dies intestate, the wife is entitled to inherit his estate, subject to the inheritance privileges of the children, if any, and to the existing debts of the decedent.[11] By statute a wife is prevented from inheriting the estate of her husband if she wilfully caused his death.[12] The Mississippi Supreme Court has held that a bigamous marriage will prevent the guilty spouse from inheriting the estate of the deceased spouse.[13] The same court has stated that wilful desertion or abandonment will estop the deserting spouse from asserting any inheritance rights in the estate of the deceased spouse.[14] Where a wife had entered a bigamous marriage after being deserted by her lawful husband, she was not allowed to inherit his estate, though she had terminated the bigamous marriage many years prior to the death of her lawful husband.[15] The court has also held, however, that where the husband left his wife two months prior to her death because of violent acts against him by her brother, he could succeed to the title of their home.[16] By way of dictum the court said that it had sustained a plea of estoppel against a husband or wife in descent and distribution cases where there was a wilful abandonment and desertion, and a bigamous marriage.[17] In the instant case the court has not seen fit to extend the rule to estop a spouse guilty of adultery from inheriting from her deceased spouse when there was no proof of a bigamous marriage.

It is submitted that in the absence of condonation by a deceased to the acts of adultery, a spouse who is guilty of the adultery is in no better position to inherit than were he guilty of abandonment, desertion, or bigamy, the underlying principle being the "clean hands" doctrine. Concededly, condonation may have been the controlling factor in the principal decision.

Robert C. Khayat

Domestic Relations—Prerequisite to Valid Marriage After Removal of Impediment

Petitioners, by this proceeding, sought to have themselves declared the legitimate children of the deceased Sauls, who had died intestate. The intestate had married Mattie Dunn in 1894. To this union were born five children, who contested the petition. Following the dissolution of that marriage, in 1913, Sauls married Katie Quinn with whom he cohabited intermittently until her death in 1951. In 1917 Sauls entered into a relationship with Daisy McCaffey, which produced four daughters,

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[10]26A C.J.S. *Descent and Distribution* § 59 (1956).

[11]Miss. Code Ann. § 470 (1956).

[12]Miss. Code Ann. § 479 (1956).

[13]See Williams v. Johnson, 148 Miss. 634, 114 So. 733 (1927).

[14]Walker v. Matthews, 191 Miss. 489, 511, 3 So. 2d 820, 826 (1941).

[15]Minor v. Higdon, 215 Miss. 513, 61 So. 2d 350 (1952).

[16]Parsons v. Butler, 230 Miss. 830, 94 So. 2d 320 (1957).

[17]*In re* Marshall, 243 Miss. 472, 478, 138 So. 2d 482, 483 (1962).

complainants in this proceeding. He maintained and supported them as his family until Daisy's death in 1952. Sauls obtained an invalid divorce from Katie in 1936 and soon thereafter consummated a ceremonial marriage with Daisy, who was unaware of the impediment to her marriage. The chancery court decreed that the marriage of Sauls to Daisy was void and that consequently the daughters were illegitimate and therefore not heirs of Sauls. HELD: Affirmed. When the impediment to a marriage, unknown to one party, is removed, an additional overt act of marriage is necessary to validate the relationship, a necessary prerequisite to legitimization by statute. *Nichols v. Sauls*, 165 So. 2d 353 (Miss. 1964).

There is an impediment when some obstacle exists at the time the man and woman attempt to marry. Such impediment will prevent a valid marriage. Upon removal of the obstruction, it is necessary to determine what is essential to validate the heretofore meretricious relationship. Common law marriages were abolished in Mississippi in 1956,[1] but since the statute was not retroactive, a common law marriage established prior thereto is accorded a legal status. It is settled that, upon elimination of the impediment, the relationship would have ripened into a valid common law marriage by means of a new agreement followed by cohabitation.[2] It was determined in 1920 that where both of the parties contracted a marriage without knowledge that the marriage was void because of an existing impediment, a valid marriage would result when the obstacle was eliminated if the parties continued to cohabit as man and wife, no new agreement being necessary.[3] The court had also held that if both of the parties, with knowledge of the existence of an impediment, attempted marriage, the illicit relationship would be presumed to continue.[4] To overcome this presumption, it was necessary to prove a new agreement or else such changed conduct toward one another that a new agreement would be presumed.[5] Until recently it had not been decided what would have been necessary to render valid such a marriage where only one of the parties had been unaware of the impediment's existence at the time of the attempted marriage.

In conflict are the cases in other jurisdictions which have considered the situation where there was a legal bar to the marriage and one of the parties acted in good faith. One group follows the theory that mutual assent, subsequent to the elimination of the impediment, can not be implied from mere continued cohabitation, since the deceiving party intended the relationship to be meretricious, and that consequently an express agreement must be proved.[6] Another line of cases adopts the rule that continued cohabitation, succeeding the removal of the obstruction, will be sufficient to effect a valid common law marriage.[7] The

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[1]MISS. CODE ANN. § 465.5 (1956).

[2]BUNKLEY & MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI 17 (1957).

[3]Sims v. Sims, 122 Miss. 745, 85 So. 73 (1920).

[4]Thompson v. Clay, 120 Miss. 190, 82 So. 1 (1919).

[5]Floyd v. Calvert, 53 Miss. 37, 46 (1876).

[6]Voorhees v. Voorhees, 46 N.J. Eq. 411, 19 Atl. 172 (1890).

[7]Hawkins v. Hawkins, 166 Ga. 153, 142 S.E. 684 (1928).

reason given is that public policy favors matrimony and legitimacy rather than concubinage and bastardy, and therefore all reasonable presumptions should be indulged in to support the former.[8] A few cases hold that, by his continued cohabitation following the elimination of the impediment, the defrauder is estopped to deny the marriage with one who entered the relation in good faith.[9] Some states have statutes providing in effect that where an undivorced person marries another and either of the parties is ignorant of the incapacitating factor, continued cohabitation in good faith by one of them, after removal of the impediment, will result in a valid marriage from the date of the elimination of the bar, and the issue of the parties will be regarded as legitimate.[10] The general purpose of such a statute is to provide against illegitimacy of the children.[11] Other states have statutes providing merely that the issue of void marriages will nevertheless be legitimate.[12]

Complainants in the principal case sought to take advantage of the Mississippi statute[13] which legitimizes, upon the marriage of the father and mother, the children born to them prior to the marriage and capacitates them to inherit as if born in wedlock. The court assigned, as the reason for denying the validity of the marriage of Sauls and Daisy, the fact that their marriage was based upon the fraud of Sauls. In an earlier decision,[14] although not concerning the point here involved, the court, by the following language, indicated a sympathetic disposition toward wives who had entered a marriage in good faith: "The innocent second wife and the unoffending offspring are not to be branded, the one as having lived in concubinage and the others as having been bastards for the misconduct of the husband and father. . . ."[15] Furthermore, by statute, today the children of bigamous marriages are accorded legitimate status.[16] The statute was not retroactive but does indicate the present policy in Mississippi. It is clear that the policy of the state is to prevent, so far as possible, the illegitimacy of children. It is respectfully submitted that the rule which permits a valid marriage to ripen from continued cohabitation, after removal of the impediment, where one of the parties acted in good faith in the original relationship, is an excellent result.

Tom S. Lee

Estate Taxation—Ultimate Burden—Effect on the Marital Deduction

Decedent, a resident of Kansas, died intestate leaving an estate valued at approximately $1,200,000. Decedent was survived by his wife

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[8]State v. Worthingham, 23 Minn. 528 (1877).

[9]Chamberlain v. Chamberlain, 68 N.J. Eq. 736, 62 Atl. 680 (1905).

[10]Mass. Ann. Laws ch. 207, § 6 (1961).

[11]Commonwealth v. Ross, 248 Mass. 15, 142 N.E. 791 (1924).

[12]Ohio Rev. Code Ann. § 2105.10 (Page 1954).

[13]Miss. Code Ann. § 474 (1956).

[14]Crawford v. State, 73 Miss. 172, 18 So. 848 (1895).

[15]*Id.* at 178, 18 So. at 849.

[16]Miss. Code Ann. § 2748-03 (Supp. 1964).

and four children. Under Kansas law of descent and distribution the widow is entitled to one-half of the total estate, and the children share the remaining one-half. The Commissioner of Internal Revenue contended that the widow's half should bear one-half of the federal estate tax and, as a result, the marital deduction should be reduced by the amount of tax so paid. Kansas has no statute apportioning the federal estate tax or otherwise specifically locating the ultimate burden of this tax. Plaintiff, administrator, paid the tax under protest and brought this action to determine the validity of the Commissioner's contention. HELD: In the absence of a state statute or testamentary direction to the contrary, the surviving spouse receives the marital deduction unreduced by federal estate taxes. *First Nat'l Bank v. United States,* 233 F. Supp. 19 (D. Kan. 1964).

The only federal statutory direction as to the burden of the federal estate tax is that the executor shall be liable to pay it.[1] However, there are statutory provisions imposing pro rata liability for payment of the tax upon the proceeds of life insurance payable to beneficiaries other than the estate[2] and the recipients of property over which the decedent had a power of appointment, provided the decedent fails to direct otherwise.[3] The ultimate burden or thrust of the federal estate tax must be determined by reference to state law,[4] and in this respect a state court's determination binds the federal taxing authorities.[5] All jurisdictions recognize the testator's right to specify where the burden of the tax shall lie.[6] Many states provide by statute for the apportionment of the federal estate tax when the decedent fails to direct otherwise, while a few states specifically prohibit apportionment of the tax.[7] The general rule in those jurisdictions which have no applicable statute is that the federal estate tax is payable from the residue of the estate,[8] as a charge against the whole estate,[9] unless the decedent directs otherwise. Some jurisdictions, which have no applicable state statute, follow the judicial doctrine of "equitable apportionment" and apportion the tax pro rata against only those whose devises or bequests create or add to the tax.[10]

The marital deduction was created in 1948,[11] to equalize federal estate taxes between community property and non-community property states.[12] It has been said that the congressional intent in enacting this law was that the marital deduction portion of the estate should bear no

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[1]INT. REV. CODE OF 1954, § 2002.

[2]INT. REV. CODE OF 1954, § 2206.

[3]INT. REV. CODE OF 1954, § 2207.

[4]Riggs v. Del Drago, 317 U.S. 95, 98 (1942).

[5]Case v. Roebling, 42 N.J. Super. 545, 127 A.2d 409, 417 (1956).

[6]*E.g.*, United States v. Goodson, 253 F.2d 900, 903 (8th Cir. 1958).

[7]*E.g.*, ARK. STAT. ANN. § 63-150 (1961) (provides for apportionment); ALA. CODE tit. 51, § 449(1) (1958) (provides against apportionment).

[8]*E.g.*, United States v. Goodson, 253 F.2d 900, 903 (8th Cir. 1958).

[9]Nat'l State Bank v. Nadeau, 57 N.J. Super. 53, 153 A.2d 854, 858 (1959).

[10]Case v. Roebling, 42 N.J. Super. 545, 127 A.2d 409, 417 (1956).

[11]INT. REV. CODE OF 1954, § 2056.

[12]Lincoln Bank & Trust Co. v. Huber, 240 S.W.2d 89, 91 (Ky. 1951).

part of the federal tax.[13] However, Hawaii has said that it would not consider the intent that congress had in passing the law.[14] On the other hand, the Wisconsin court has declared that congress did not intend for the marital deduction portion of the estate to entirely escape the impact of the federal estate tax, since it had specifically said that the marital deduction should be reduced by the amount of taxes paid from the marital deduction portion of the estate.[15] Some authorities look upon the federal estate tax as being an item of expense in administering the estate and treat the payment of it the same as debts, funeral expenses, and other claims which are payable out of the residue of the estate.[16] One state has said that even though the federal estate tax is a lien on the gross estate which must be paid, the tax is not an item of expense in administering the estate nor a debt of the estate.[17] It has been said that since the marital deduction is similar to the deduction allowed for charitable bequests, and since these bequests are free from the federal estate tax, property qualifying for the marital deduction should also be free from the federal estate tax.[18] One opinion has suggested that, even though the marital deduction reduces the tax owed and no tax is computed on it, the marital deduction portion of the estate should be required to pay a share of the tax since the surviving spouse is one of the persons benefited by the decedent's death.[19] This reasoning has been rejected by one court which held that the marital deduction portion of the estate should be eliminated from the tax burden since it does not in any way create or add to the tax owed.[20]

From the standpoint of the taxpayer the instant case adopts the better view by allowing the marital deduction portion of the estate to go free from all estate tax, because by doing so the amount of estate tax owed is minimized. If the federal estate tax were taken from the gross estate, the amount of the estate which would be available for the marital deduction would be smaller, and thus the taxes on the whole estate would be greater. Also, if the marital deduction portion of the estate were required to pay any part of the federal estate tax, the marital deduction would be reduced by the amount of taxes paid from it and thereby increase the amount of the estate upon which the federal estate tax is computed, with the result that the estate would pay more tax. Since the law of the domicile is determinative of the ultimate burden of the estate tax,[21] the marital deduction portion of the estate will be smaller in those states which require the marital deduction portion to pay a part of the tax than in those states not requiring it to pay a part of the tax. As a result, the amount of tax owed on an estate will be

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[13] *In re* Peters' Will, 88 N.Y.S.2d 142, 147 (1949).

[14] In the Matter of Estate of Glover, 45 Hawaii 569, 371 P.2d 361, 365 (1962).

[15] *In re* Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641, 645 (1953).

[16] Lawless v. Lawless, 17 Ill. App. 2d 481, 150 N.E.2d 646, 651 (1958).

[17] *In re* Barnhart's Estate, 102 N.H. 519, 162 A.2d 168, 171 (1960).

[18] *In re* Peters' Will, 88 N.Y.S.2d 142, 147 (1949).

[19] Weinberg v. Safe Deposit & Trust Co., 198 Md. 539, 85 A.2d 50, 55-56 (1951).

[20] Case v. Roebling, 42 N.J. Super. 545, 127 A.2d 409, 424 (1956).

[21] Riggs v. Del Drago, 317 U.S. 95, 98 (1942).

greater in some states than in others.[22] Certainly this lack of uniformity between the states in determining the amount of estate tax is defeating what has been said to be Congress's purpose in enacting the marital deduction, namely, to equalize estate taxes among all of the states.[23] It is recommended that Mississippi adopt legislation apportioning the federal estate tax against all parties sharing in the estate of an intestate decedent or any other decedent who fails to specify where the burden of the tax shall lie, and such legislation should specifically relieve the marital deduction portion of the estate from the federal estate tax.

John G. Gourlay, Jr.

FEDERAL JURISDICTION—REMOVAL STATUTE—CIVIL RIGHTS

Petitioner, a COFO member working in a voter registration drive, was accused of violating a city ordinance when she photographed a portion of the interior of the Clarksdale City Hall without the permission of the mayor and commissioners of that city. The ordinance, applying to "any person or persons" doing specified acts, was non-discriminatory on its face. While her trial was pending in the Clarksdale police court, she filed a petition for removal of the case to the federal district court. Petitioner alleged, as a basis for removal, that her arrest was merely a harassing tactic to prevent her activity in the voter registration drive; she also alleged discrimination by the community, both in private and public life, against her personally, against Negroes, and against all persons who were affiliated with civil rights organizations. Petitioner alleged that because of such discrimination she was entitled to removal under 28 U.S.C. § 1443(1) which provides for removal when a person is denied or cannot enforce in the state courts "a right under any law providing for the equal civil rights of citizens of the United States"; she also claimed that she was entitled to removal under 28 U.S.C. § 1443(2) which provides for removal from a state court for prosecution of an act performed "under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." HELD: Removal denied. Section 1443(1) authorizes removal only where the constitution or laws of a state deny equal rights, and not where the alleged discrimination will result from a misapplication of such constitution or laws; section 1443(2) authorizes removal only when a prosecution is being brought against a defendant for an act which he performed in at least a quasi-official capacity which is derived from any law providing for equal rights. *City of Clarksdale v. Gertge*, 237 F. Supp. 213 (N.D. Miss. 1964).

Title 28 U.S.C. § 1443, which originated in the nineteenth century, provides for removal of cases to federal district courts when there has been a deprivation of equal civil rights. Subsection (1) of that statute gives a right of removal to the federal courts when a defendant is denied or cannot enforce in the state courts a right under any law providing for equal civil rights of United States citizens. Prior to the Civil Rights Act of 1964, the courts uniformly held that the alleged

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[22]Weyenberg v. United States, 135 F. Supp. 299, 301 (E.D. Wis. 1955).

[23]Lincoln Bank & Trust Co. v. Huber, 240 S.W.2d 89, 91 (Ky. 1951).

discrimination must result from the state constitution or statutes as construed by the highest court of the state before removal would be available.[1] Illegal or discriminatory acts by state officials or by individuals, whose acts were not authorized by state law, would not afford a basis for removal.[2] Where the state constitution or laws did not authorize such discrimination, but where such discrimination did in fact exist, the proper remedy was to be found in the courts of the state with the right ultimately to present the matter by appellate review to the United States Supreme Court.[3] The courts have given a strict interpretation to subsection (1) and have held that neither local prejudice,[4] racial prejudice,[5] the denial to summon or impanel colored jurors,[6] nor the exclusion of Negroes from elections at which state judges were elected[7] entitles the petitioner to removal when such acts were not authorized by the state constitution or laws. Subsection (2) provides for removal for an act done under color of authority derived from any law providing for equal rights. In the few cases which have interpreted subsection (2) prior to the Civil Rights Act of 1964, the courts concerned themselves mainly with the applicability of the term "color of authority." In *Hodgson v. Millward*,[8] removal was allowed where an officer, who was acting under a warrant purporting to have been issued from the President, was held to be acting under color of authority. In *Arkansas v. Howard*,[9] the district court denied removal to a defendant whose prosecution arose out of an altercation which took place while he was taking two colored children home from a court-ordered integrated school. The court declared that he was not acting under color of authority derived from any law providing for equal rights but was acting purely as a private citizen.[10]

The 1964 Civil Rights Act has caused speculation concerning the application of section 1443. Section 901 of the Civil Rights Act provides that the order of a district court remanding a case to the state court from which it was removed pursuant to section 1443 "shall be reviewable by appeal or otherwise." Formerly, a remand order by the district court was final and could not be appealed.[11] In the congressional debates

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[1]Virginia v. Rives, 100 U.S. 313, 319 (1879); North Carolina v. Alston, 227 F. Supp. 887 (M.D.N.C. 1964).

[2]Kentucky v. Powers, 201 U.S. 1 (1906); North Carolina v. Alston, 227 F. Supp. 887 (M.D.N.C. 1964).

[3]City of Birmingham v. Croskey, 217 F. Supp. 947 (N.D. Ala. 1963); Anderson v. Tennessee, 228 F. Supp. 207 (E.D. Tenn. 1963).

[4]Rand v. Arkansas, 191 F. Supp. 20, 25 (W.D. Ark. 1961); Commonwealth v. Millen, 289 Mass. 441, 194 N.E. 463, 474 (1935).

[5]Norris v. State, 236 Ala. 281, 182 So. 69 (1938); Anderson v. Tennessee, 228 F. Supp. 207 (E.D. Tenn. 1963).

[6]Kentucky v. Powers, 201 U.S. 1 (1906); Gibson v. Mississippi, 162 U.S. 565, 581 (1896).

[7]City of Birmingham v. Croskey, 217 F. Supp. 947 (N.D. Ala. 1963).

[8]12 Fed. Cas. 285 (No. 6568) (C.C.E.D. Pa. 1863).

[9]218 F. Supp. 626 (E.D. Ark. 1963).

[10]*Id.* at 634.

[11]28 U.S.C. § 1447(d) (1952).

concerning the then proposed section 901, there was discussion to the effect that section 1443 should be re-examined and that the purpose of section 901 would be to give appellate courts an opportunity to consider the meaning of the removal statute.[12] The cases which have construed section 1443 since the passage of the Civil Rights Act illustrate that the effects of section 901 have not yet been fully determined. In the noted case and in the cases of *Alabama v. Holliday*[13] and *Alabama v. Shine*,[14] the courts continued to refuse removal where the alleged discrimination resulted from a misapplication of state laws that were non-discriminatory on their face. In the case of *New York v. Galamison*,[15] the Second Circuit, in denying removal, indicated that the scope of section 1443(2) was not clear. In summarizing, the court stated that it was not deciding the question of whether the "color of authority" clause was limited to officers and quasi-officials, thus indicating that it was possible that the "color of authority" clause might be extended to private citizens.[16] Also, in discussing the restrictive decisions applying section 1443(1) the court stated that "the congressional debate on Title IX of the Civil Rights Act of 1964 indicated a not unreasonable expectation that these restrictive decisions would be re-examined." In *Rachel v. Georgia*,[17] the court of appeals stated that the appellant-defendants were entitled to removal to the district court under section 1443(1) upon showing that their exclusion from places of public accommodations was for racial reasons.

Thus far, the full ramifications of section 901 of the Civil Rights Act are unknown. It appears that it will require a decision of the United States Supreme Court, interpreting section 901, before there can be any final determination of whether section 901 is to be construed as giving rise to a more liberal interpretation of section 1443, and, if so, then to what extent it is to be liberalized. If the term "color of authority" as used in section 1443(2) is to apply to the capacity in which a person acts, it is clear that such interpretation would limit the applicability of the term to a person who is acting in an official or quasi-official capacity. It is submitted, however, that "color of authority" as used in subsection (2) is subject to the possible interpretation of referring to a specific federal *law* which gives a person authority and motivation to do an act in furtherance of equal rights, rather than referring to the *capacity* in which an act in support of equal rights is done.[18] The express words in subsection (1) do not limit its application to situations in which the state constitution or laws have been discriminatory on their face; such a limitation has been a result of judicial interpretation. Therefore, since it appears that section 901 along with the congressional debate surrounding that section call for a re-examination of the applicability of section

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[12]110 CONG. REC. 6739 (1964).

[13]9 RACE REL. L. REP. 1379 (M.D. Ala. 1964).

[14]233 F. Supp. 371 (M.D. Ala. 1964).

[15]New York v. Galamison, 33 U.S.L. WEEK 2389 (2d Cir. 1965).

[16]See New York v. Galamison, 33 U.S.L. WEEK 2389 (2d Cir. 1965).

[17]33 U.S.L. WEEK 2457 (5th Cir. 1965).

[18]See New York v. Galamison, 33 U.S.L. WEEK 2389, 2390 (2d Cir. 1965) (concurring opinion).

1443, and since the Supreme Court could liberalize the applicability of section 1443, at least to some extent, without violating the express words of the statute, it is probable that the Supreme Court will so liberalize section 1443 if it feels that such liberalization is necessary for the protection of a right not otherwise properly protected.

James S. George

LABOR LAW—MANDATORY BARGAINING ON SUBCONTRACTING

Employer and the exclusive bargaining agent for a unit of the company's maintenance men were bound by a contract which was to expire on July 31, 1959. Due to employer resistance, the first meeting to discuss the new contract was held on July 27, 1959, four days before the termination of the contract. At this meeting the employer notified the union that substantial savings could be effected by subcontracting to an independent contractor work previously done by the employer's maintenance unit and that, in fact, such a decision had already been made. The independent contractor was to perform the identical services in the same plant as the union unit, but with other men. Although maintenance costs had been discussed in bargaining sessions of previous years, the employer refused to bargain on the subcontracting and by the second meeting, July 30, 1959, had made the selection of the maintenance firm. Upon the dismissal of the maintenance employees the next day, the union established a picket line at the plant and later filed an unfair labor practice charge against the employer, alleging violations of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Taft-Hartley Act. Upon a petition for reconsideration the Board found the employer guilty of a violation of section 8(a)(5) and ordered the reinstatement of the employees with back pay. The court of appeals enforced the order; the Supreme Court granted certiorari. HELD: Affirmed. Employer's unilateral action in subcontracting maintenance work, which had the effect of replacing an entire unit of maintenance workers with an independent contractor, was a failure of the employer to bargain in good faith on terms and conditions of employment. *Fibreboard Paper Products Corp. v. NLRB*, 85 U.S. 398 (1964), *affirming East Bay Union of Machinists v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963), *enforcing Fibreboard Paper Products Corp.*, 138 N.L.R.B. 550 (1962), *reversing on reconsideration* 130 N.L.R.B. 1558 (1961).

The National Labor Relations Act imposes upon both the employer[1] and the union[2] the duty to bargain together in good faith. The duty to bargain does not require a readiness to change one's position or an actual change of position.[3] The parties have the right to bargain for what they want, but both management and labor must make a bona

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[1]National Labor Relations Act § 8(a)(5), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(5) (1958).

[2]National Labor Relations Act § 8(b)(3), 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(3) (1958).

[3]NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953).

fide effort to compose their differences in some manner.[4] The duty to bargain does not prevent a party from using economic weapons against his adversary for the purpose of forcing a concession,[5] but an employer cannot unilaterally grant economic benefits to his employees during the bargaining period so as to go over the head of the union.[6] The Board does not have the authority to balance the bargaining strengths of the parties.[7] One of the pitfalls of the bargaining process is the existence of nonbargainable, compulsory, or permissive issues, each of which places a different obligation on the participants.[8] Neither party can lawfully bargain over a nonbargainable matter, because by law the matter must be either included or excluded from the contract. A recognition clause is a nonbargainable issue, because it must be included in the contract;[9] a hot cargo agreement is nonbargainable, because it must be excluded.[10] The parties must bargain over compulsory subjects which are "wages, hours, and other terms and conditions of employment."[11] Upon all other residual or permissive issues, the parties may bargain, but an insistence upon a permissive matter to the point of an impasse or as a condition precedent to other issues constitutes an unfair labor practice.[12] Upon mandatory subjects the parties can insist upon a particular point until an impasse is reached.[13] Custom and bargaining history are important in determining into which classification a subject may fall.[14] In *Inland Steel Co. v. NLRB*,[15] the court held that the duty to bargain over "wages, hours, and other terms and conditions of employment" should be given a broad interpretation, even broader than when the act was passed. The following have been held to be mandatory subjects of bargaining: individual merit wage increases;[16] incentive pay;[17] stock bonus plans;[18] union security clauses;[19] termination of employ-

[4]See *Ibid.*

[5]NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 490-91 (1960).

[6]NLRB v. Katz, 369 U.S. 736, 745 (1962).

[7]NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 497-98 (1960).

[8]See NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

[9]Simplicity Pattern Co., 102 N.L.R.B. 1283 (1953).

[10]National Labor Relations Act § 8(b)(7)(e), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(7)(e) (Supp. 1964).

[11]National Labor Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

[12]NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

[13]NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

[14]See Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 413-15 (1950).

[15]170 F.2d 247, 254 (7th Cir. 1948).

[16]NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir. 1948).

[17]John W. Bolton & Sons, Inc., 91 N.L.R.B. 989 (1950).

[18]Richfield Oil Corp. v. NLRB, 231 F.2d 717 (D.C. Cir. 1956).

[19]Duro Fittings Co., 121 N.L.R.B. 377 (1958).

ment;[20] grievances;[21] paid holidays and vacations;[22] and coffee breaks.[23]

After the collective bargaining agreement has been signed, management usually contends that it retains all rights and prerogatives not covered by the contract or alternatively that the union has waived these rights. Although the Board has infrequently found a waiver,[24] the retention theory has had some acceptance.[25] A management's rights clause is a mandatory subject of bargaining.[26] Among those powers which management claims it retains, there being no agreement to the contrary, is the right to contract out. In the bargaining stage, the Board contends that subcontracting rights are a mandatory matter as they are included within the phrase "other terms and conditions of employment."[27] After the contract is in effect, labor argues for a restriction on subcontracting which is to be implied from either the recognition clause, the seniority clause, or the list of job classification.[28] The cases have consistently held that an employer may not contract out for antiunion purposes.[29] When the subcontracting has been motivated by economic considerations, the cases have had varying results. In *Timken Roller Bearing Co.*,[30] the Board held a refusal to bargain over subcontracting was a violation of section 8 (a)(5) of the act. The next year the Board held the decision to contract out was within the sole discretion of the employer, provided there were no antiunion motives present.[31] In 1959, a divided Board held that the employer did not have to discuss the *decision* to subcontract, but management was required to discuss the *impact* of the decision on the displaced employees.[32] In overruling its determination of the previous year,[33] the Board in *Town & Country*,[34] a case which involved subcontracting for an antiunion purpose, held by way of dictum that regardless of the presence or absence of antiunionism the employer was under a duty to bargain over subcontracting. In the *Hawaii Meat Co.* case,[35] the Board applying the *Town & Country* doctrine found the employer under a duty to bargain over subcontract-

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[20]Inland Steel Co. v. NLRB, 170 F.2d 247, 252 (7th Cir. 1948).

[21]Arundel Corp., 59 N.L.R.B. 505 (1944).

[22]Singer Mfg. Co., 24 N.L.R.B. 444, 470 (1940).

[23]Fleming Mfg. Co., 119 N.L.R.B. 452 (1957).

[24]Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

[25]Fairiweather, *Implied Restrictions on Work Movements—The Pernicious Crow of Labor Contract Construction*, 38 NOTRE DAME LAW. 518, 531-34 (1963).

[26]NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 409 (1952).

[27]Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946).

[28]Fairiweather, *supra* note 25, at 521.

[29]*E.g.*, Hays Corp., 64 N.L.R.B. 406 (1945).

[30]70 N.L.R.B. 500 (1946).

[31]Pepsi-Cola Bottling Co., 72 N.L.R.B. 601 (1947).

[32]Shamrock Dairy Inc., 124 N.L.R.B. 494 (1959).

[33]Fibreboard Paper Products Corp., 130 N.L.R.B. 1558 (1961).

[34]Town & Country Mfg. Co., 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

[35]139 N.L.R.B. 966 (1962).

ing during an economic strike; the Ninth Circuit refused enforcement because of the employer's right to make permanent replacements during an economic strike.[36] In another recent case,[37] the employer replaced for economic reasons a union unit which had unsuccessfully sought to include a no-subcontracting clause in their contract. The Board ordered reinstatement with back pay, but the Eighth Circuit partially denied enforcement[38] as there was no specific illegal intention to discourage unionism on the part of the employer.[39]

A reading of the principal case will disclose the only law decided was that an employer cannot replace an existing unit of employees with an independent contractor who would perform the same function on the same situs without bargaining over the decision with the union. The big question of whether an employer may freely subcontract for economic motives or whether the Board's *Town & Country* approach was to prevail was avoided. The Court wisely preferred to base its opinion upon the factual situation currently before it. A decision promanagement or prolabor by the Supreme Court would have frozen the very fluid field of collective bargaining. It would seem that the right to subcontract ought to be dependent upon the kind of work to be subcontracted, the industry custom, and the practice of the particular plant. Each case should be decided upon its own merits, not upon a generalization. In a post-*Fibreboard* decision,[40] the Board has held that a company can contract out work without consulting the union, if the subcontracting is the usual or standard practice of the employer.

Nick Mavar, Jr.

Oil and Gas—Negligence in Clearing Drilling Site

In the early part of 1960, the oil field in question was being developed by the lessee oil company. In February, lessor wrote lessee demanding that lessee drill, because the property was being drained by adjoining wells. On the morning of March 23, lessee began clearing the site. This decision was based on the problem of having the site cleared in the event an interference test justified moving a drilling rig from an adjoining location which was to be completed within three days and on the constant pressure exerted by the lessor to prevent drainage. The site was cleared within two and a half days. When lessee began clearing the site it knew that the field was subject to sudden flooding by salt water; that the probable oil-water contact line ran near lessor's site; that the well located on the east offset showed an oil-water contact similar to a well located to the northwest which was producing 100 per cent salt water; and that an interference test was being conducted. It is not clear exactly when the decision was made by the

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[36]Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963).

[37]Adams Dairy, Inc., 137 N.L.R.B. 815, 817 (1962).

[38]NLRB v. Adams Dairy, Inc., 322 F.2d 553 (8th Cir. 1963), *petition for cert. filed*, 32 U.S.L. Week 3255 (U.S. Jan. 8, 1964) (No. 741).

[39]NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

[40]Westinghouse Electric Corp., 4 CCH Lab. L. Rep. 9079 (1965).

lessee to suspend drilling operations, but the inference is that this decision was made either on the late evening of March 23, or within two or three days thereafter. The decision was based on the results of the interference test which became known late the evening lessee began clearing the site, as well as other facts known to the lessee. On May 24, lessor again demanded that the lessee drill or release the lands from the lease. On June 3, after other tests, lessee made further preparations for drilling. While these preparations were in process, surrounding wells began producing excessive amounts of salt water. The decision was then made to abandon the lessor's site. The circuit court jury rendered a verdict for the lessor. HELD: Affirmed as to liability; reversed and remanded for trial on the issue of damages. Even though the temporary and final abandonment of a drilling location are acts of a prudent operator, the lessee in an oil and gas lease is liable for damages resulting from clearing a location in preparation for drilling, when it knew, or in the exercise of reasonable care should have known, that it would probably not drill. *Sun Oil Co. v. Nunnery*, 170 So. 2d 24 (Miss. 1964).

An oil and gas lease carries with it the right to use the land to the extent reasonably necessary to fulfill the obligations imposed by the lease.[1] This right is based upon the principle that when a thing is granted, or an obligation assumed, it is implied that the grantee or obligee takes the right to use all reasonable means to obtain that which is granted or to perform the obligation.[2] The lessee has the right to go upon the land and to use as much of the leased premises as reasonably necessary to comply with the terms of the lease and to effect its purpose.[3] The lessee may not be held liable for damage for the use of the surface, unless negligent or unreasonable use is established.[4] The determination of negligence is measured by the external standard of the prudent operator,[5] which requires that the lessee reasonably develop the land as a prudent operator would under similar circumstances, having regard to the interests of both lessor and lessee.[6] Most of the cases concerning the liability of a lessee for surface damages have involved negligent use of a reasonable amount of land[7] or the use of an unreasonable amount of land.[8]

Coffindaffer v. Hope Natural Gas Co.,[9] an early West Virginia decision, seems to be the only case prior to the subject case concerning the liability of a lessee for surface damage for the prudent use of a reasonable amount of land. In *Coffindaffer* the lessee, acting in a careful manner and in good faith, built a road across lessor's lands for the purpose of drilling.[10] The later abandonment without drilling was held

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[1]Gulf Ref. Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955).

[2]See Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963).

[3]Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962).

[4]See Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963).

[5]See Monsanto Chemical Co. v. Sykes, 245 Miss. 207, 147 So. 2d 290 (1962).

[6]Brewster v. Lanyon Zinc Co., 140 Fed. 801, 814 (8th Cir. 1905).

[7]See, *e.g.*, Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963).

[8]*E.g.*, Texaco, Inc. v. Joffrion, 363 S.W.2d 827 (Tex. Civ. App. 1962).

[9]74 W. Va. 107, 81 S.E. 966 (1914).

[10]Coffindaffer v. Hope Natural Gas Co., 74 W. Va. 107, 81 S.E. 966 (1914).

by the court to make the lessee a trespasser ab initio and liable in damages.[11] The court stated that the right of the lessee to enter upon the lessor's land was confined to the purpose of exploration and production for oil and gas, if any was found.[12] The West Virginia court reasoned that since the lessee did not do this, even though it entered on the land in good faith, it could not be said to have exercised a right under the lease and was technically a trespasser.[13] The Mississippi court rejected the reasoning that a lessee who rightfully enters land in good faith subsequently becomes a trespasser because of something it later failed to do, stating that *Coffindaffer* was decided before the development of the law concerning the rights of parties to oil and gas leases, and that it did not take into account the prudent operator rule.[14] The opinion in the instant case declared that the entry on the lessor's land must be negligent in order to hold the lessee liable[15] and maintained that the lessee was negligent in its entry on the land when it knew, or in the exercise of reasonable care should have known, that it would probably not drill.[16]

Rather than holding the lessee liable in contract, the court might well have concluded that, since the lessee only had a right to a reasonable use of the land, any unreasonable or negligent use was a trespass ab initio. The *Coffindaffer* case[17] was based upon the theory that the only reason the lessor agreed to subject his land to extensive surface damages was the expectation of profits to be derived from production. Since the development of the law concerning the rights of parties to an oil and gas lease, it is implied that the lessee has the right to enter and develop the land as a prudent operator under similar circumstances. It seems logical that a prudent operator would not go to the expense of using the land when he knew that he would not drill. In holding the lessee liable when it knew, or in the exercise of reasonable care should have known, that it would not drill, the court is, in effect, requiring the lessee to foresee the possibility that it might not drill. Does this not raise the standard of conduct required of a prudent operator by placing upon him a greater burden than that which previously existed? The test set forth in the subject case fails to take into account the pressure placed on the lessee by the lessor to prevent drainage and the logistical problems which confronted the lessee in developing the oil field. The lessee is placed in the conflicting position of waiting for additional information before clearing the site and of having the site ready for drilling in order to meet his implied obligation to prevent drainage. The latter alternative would seem to permit a lessor to hold a lessee liable anytime it drilled in order to prevent drainage and then later, based on additional information, abandon its operations. Since

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] Sun Oil Co. v. Nunnery, 170 So. 2d 24, 31 (Miss. 1964).

[15] *Id.* at 29.

[16] *Ibid.*

[17] Coffindaffer v. Hope Natural Gas Co., 74 W. Va. 107, 81 S.E. 966 (1914).

the prevention of drainage may be of greater pecuniary benefit to the lessor, the lessee should not be discouraged from drilling as soon as possible.

Arthur E. Ray, Jr.

Set-Off—Requirement of Pleading

The plaintiff brought this action in the Hinds county court on a judgment rendered in his favor in a district court of Louisiana, for the amount of $753.00, together with legal interest, from the date of judicial demand until paid, and all costs. The defendant in his answer admitted the facts alleged in the declaration and also filed a set-off claim showing that at the time the suit was filed by the plaintiff, the plaintiff was indebted to the defendant, as shown by an account of set-off attached to the defendant's answer. This claim of set-off stated that the indebtedness of the plaintiff exceeded the demand of the plaintiff. The plaintiff moved to strike the set-off on the grounds that it did not state a cause of action; that the account of set-off did not arise out of the same cause of action; that the defendant was estopped from pleading the set-off on the ground of res judicata; and that the defendant was estopped from pleading the set-off on the ground of laches. The trial court sustained the motion to strike and judgment was entered for the plaintiff. An appeal was taken to the circuit court which affirmed the judgment, from which there was an appeal. Held: Reversed and remanded. A defendant's claim of set-off for an amount allegedly owed the defendant by the plaintiff, which was ascertained or ascertainable by calculation and which arose out of dealings that created a mutual indebtedness between the parties, is not res judicata simply because it might have been included in the adjudication of a prior case, if in fact, it was not presented by pleadings or necessarily involved therein, nor will items of set-off acquired before being barred by the statute of limitations be precluded from being used as a set-off against the debt sued on. *Gerard v. Foster*, 168 So. 2d 518 (Miss. 1964).

The object of the various forms of cross-demands, the set-off included, is to prevent a multiplicity of suits by setting up a framework for permitting the entire controversy between the parties, so far as is practical and just, to be adjudicated in a single cause of action.[1] "A set-off is a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, . . ."[2] which may be permitted to discharge the plaintiff's demand, in whole or in part, if there will not be too serious a departure from the original issues of the plaintiff's cause of action. The remedy of set-off is purely statutory in nature for it was not recognized at common law[3], although equity used the set-off to prevent injustice and a multiplicity of suits

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[1]Tampa Leather Co. v. Smith, 156 Fla. 801, 24 So. 2d 523 (1946); McFall v. Burley Tobacco Growers' Co-op. Ass'n, 246 Ky. 278, 54 S.W.2d 922 (1932).

[2]Raymond v. State, 54 Miss. 562, 563 (1877).

[3]Hoover Commercial Co. v. Humphrey, 107 Miss. 810, 66 So. 214 (1914); Henry v. Hoover, 14 Miss. (6 S. & M.) 417 (1846).

before there was a similar right at law.[4] In order to fulfill the necessity that the issues shall not become too involved and cumbersome, the set-off is limited to liquidated demands, those wherein the amounts are capable of reasonable calculation, which are founded upon a contract, either expressed or implied,[5] and which have created a mutual indebtedness.[6] A mutual indebtedness indicates dealings between the parties, the defendant and the plaintiff being indebted to each other, "each reciprocally acting, giving, and receiving."[7] Transactions creating this mutual indebtedness must be of such a nature that the defendant could have instituted a separate cause of action against the plaintiff at the date of the institution of the suit, in order to be a proper subject of a set-off.[8] Where there is no statute expressly granting such jurisdiction, a court may permit a set-off only when that court would have jurisdiction to adjudicate the claim originally.[9] The set-off, being remedial in nature, is governed by the law of the forum and not the *lex loci contractus*.[10]

Mississippi has a statute authorizing the pleading of a set-off as follows: "Where a mutual indebtedness exists between the plaintiff and defendant, the defendant may plead and set-off against the demand of the plaintiff any debt or demand which he may have against the plaintiff . . . ."[11] It is also provided by statute that if a defendant is to perfect a plea of set-off, "he shall file with his plea or motion an account, stating distinctly the nature of the set-off and the several items thereof, and a copy of any writing intended to be set-off . . . ."[12] Similar statutes are generally construed to permit a set-off of each mutual indebtedness between the parties and not just those arising from the transaction on which the plaintiff's claim is based.[13] It is possible to plead any mutual indebtedness which exists between the parties,[14] but a matter is not res judicata only because it might have been set-off in a prior action, if it was not placed in issue or was not necessarily involved in the issue.[15] The claim which is set-off against the plaintiff must be mature and in the possession of the defendant at the start of the action,[16] but if the defendant held the items which are pleaded in

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[4]Hazard v. Bank of Hickory Flat, 152 Miss. 191, 119 So. 173 (1928); Graves v. Hull, 27 Miss. (5 Cushm.) 419 (1854).

[5]Weil Bros. v. Wittjen, 116 Miss. 514, 77 So. 308 (1918).

[6]General Motors Acceptance Corp. v. Trull, 166 Miss. 490, 148 So. 390 (1933).

[7]Shapleigh Hardware Co. v. Brumfield, 159 Miss. 175, 132 So. 93, 94 (1931).

[8]Smith v. Warner, 16 Mich. 389 (1868).

[9]Axley v. Hammock, 185 Ark. 939, 50 S.W.2d 608 (1932); Malcolm v. Larson, 158 Kan. 423, 148 P.2d 291 (1944).

[10]State Nat'l Bank v. Cantrell, 47 N.M. 389, 143 P.2d 592 (1943); *In re* Seybold's Estate, 223 Wis. 192, 270 N.W. 87 (1936).

[11]Miss. Code Ann. § 1481 (1956).

[12]Miss. Code Ann. § 1482 (1956).

[13]Brown v. Stotts City Bank, 327 Mo. 747, 38 S.W.2d 722 (1931).

[14]*Ibid.*

[15]Bush v. City of Laurel, 234 Miss. 93, 105 So. 2d 562 (1958); Davis v. Davis, 65 Miss. 498, 4 So. 554 (1888).

[16]Chandler v. Cooke, 163 Miss. 147, 137 So. 496 (1931).

set-off before they were barred by the statute of limitations, the fact that they would be barred in a separate action will not preclude the defendant from using them as a set-off in an action by a plaintiff.[17]

Mississippi's supreme court has adopted a reasonable and just interpretation of the set-off statute, making possible a minimum of litigation between the parties, while at the same time retaining the necessary safeguards to protect the plaintiff and his cause of action. The requirement that a claim be liquidated to be properly the subject of a set-off protects the plaintiff from having his cause of action against the defendant confused and possibly defeated by the introduction of such issues as the value or amount of the defendant's claim. The rights of the defendant were recognized in the determination that any mutual indebtedness might be pleaded as a set-off, even though arising from other transactions than that which created the plaintiff's cause of action. This protection of the defendant was further advanced by the ruling that the use of a set-off is optional with a defendant in that it is not barred if not used, and that even a claim which is barred by the statute of limitations may be set-off against a cause of action by the plaintiff, if that claim was acquired by the defendant before it was barred in an independent action. The *Gerard* case advances no startling new rules of set-off, but it does state the court's position under the set-off statute in a very clear and concise manner, giving Mississippi a just and reasonable position on the matter.

A. Vincent Blackwell

Workmen's Compensation—Medical Expenses and Temporary Total Not Apportionable

Claimant received injuries to his hand and arm when the machine which he was operating, because of inadequate brakes, ran into a ditch. He began suffering chest pains and subsequently lost consciousness, at which time he was hospitalized. Claimant was found to have suffered a coronary occlusion which was brought on by his work, but to which a pre-existing atherosclerotic condition had contributed. The attorney referee found that claimant had not reached maximum medical recovery at the time of the hearing, and that the pre-existing disease had contributed to his disability by fifty per cent. The employer was ordered to pay all medical expenses. Temporary total payments were set at seventeen dollars and fifty cents per week, thereby apportioning temporary total disability between the prior condition and the accident. The order was affirmed by the commission and by the circuit court on appeal. Held: Affirmed in part and reversed in part. Construing the apportionment section[1] of the Mississippi Workmen's Compensation Act within the context of the entire act, apportionment of benefits is to be made only at such time as maximum medical recovery is attained; therefore, neither medical expenses nor temporary total benefits may be apportioned. *Sanders v. B. E. Walker Constr. Co.*, 169 So. 2d 803 (Miss. 1964).

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[17]Jones v. Brewer, 146 Miss. 142, 110 So. 115 (1926).

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[1]Miss. Code Ann. § 6998-04 (Supp. 1962).

The employer, as a general rule, takes the employee as he finds him.[2] Absent a statute, the last employer of an injured employee pays for the entire result of the injury, despite any prior contributing condition on the part of the workman.[3] This rule casts a hardship upon the employer of a physically unsound person by requiring him to pay for results which are not attributable to the on-the-job injury.[4] The handicapped employee, on the other hand, faces the danger of losing his job for the same reasons.[5] In an attempt to overcome both of these problems, most states have enacted some form of statute to distribute the burden. Second injury funds have been established in many states.[6] Under the Oklahoma statute,[7] a typical statute of this type, a percentage of all compensation paid, plus a like amount from the carrier or employer, goes into the fund. A portion of the compensation due after the second injury is paid from the fund and the employer pays the rest. Nine states,[8] other than Mississippi, have met the problem by passing apportionment statutes. The mechanics of these statutes vary, but basically they provide that the last employer shall be liable only for that part of the disability which is not attributable to the employee's pre-existing condition.[9] The Mississippi apportionment clause[10] is general in its terms, providing that where a pre-existing physical handicap, disease, or lesion is shown by medical testimony to have contributed to the results following the injury, the compensation payable shall be reduced by the proportion which the prior condition contributed to the results. No particular phase of compensation is mentioned within this section.

Temporary total disability, or temporary partial as the facts may indicate, occurs during the healing period of the injured employee, or during the period that the employee is unable, because of his injury, to perform any kind of labor.[11] It has been held[12] that an employee may perform light work under medical advice and still retain his temporary total status. However, it is still generally true that temporary total is the period of complete wage loss following the injury, during which compensation is payable.[13] The statutes and case law of other jurisdictions provide little help in deciding whether temporary total should be

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[2]Comment, 30 MISS. L.J. 312 (1959).

[3]See Martin v. Snuffy's Steak House, 46 N.J. Super. 425, 134 A.2d 789, 792 (1957).

[4]Shanahan, *Amendments to the Workmen's Compensation Act 1956-1958*, 30 MISS. L.J. 105, 109 (1959).

[5]2 LARSON, WORKMEN'S COMPENSATION, § 59.31 (1952).

[6]See 44 MICH. L. REV. 1161 (1946).

[7]OKLA. STAT. ANN. tit. 85, §§ 172-73 (Supp. 1964).

[8]California, Connecticut, Florida, Idaho, Indiana, Kentucky, Maryland, North Dakota, and Washington.

[9]*E.g.*, IDAHO CODE ANN. § 72-323 (Supp. 1963).

[10]MISS. CODE ANN. § 6998-04 (Supp. 1962).

[11]SCHNEIDER, WORKMEN'S COMPENSATION, § 2308 (1957).

[12]J. F. Crowe Well Servicing Contractor v. Fielder, 224 Miss. 353, 80 So. 2d 29 (1955).

[13]2 LARSON, WORKMEN'S COMPENSATION, § 57.10 (1952).

apportionable in Mississippi. The Maryland apportionment statute[14] says simply: "This subsection shall not apply to temporary total and temporary partial disability." Conversely, the Idaho court[15] has apportioned both temporary total and medical expenses under that state's statute.[16] It appears that even in Idaho, however, temporary total and medical expenses are generally charged to the employer.[17]

A reading of portions of the Mississippi Workmen's Compensation Act raises an interesting proposition regarding the legislative intent as to the limits of apportionment. The section instituting apportionment[18] and the section setting the maximum amount of compensation recoverable[19] indicate their respective scopes with similar language. If these two sections are read as one, they seem to say that compensation shall be payable for injury or death from accident, up to a maximum of $14,500 exclusive of medical expenses, but shall be reduced in the presence of certain prior physical conditions of the claimant. The legislature, it appears, intended that these two sections should cover the same subject matter. From this standpoint the decision in the instant case to exclude medical expenses from apportionment would be quite correct. Medical expenses are specifically excluded from the maximum amount recoverable. The apportionment clause makes no specific exclusions, but if medical expenses are not "compensation" within the meaning of the maximum recovery section, it is logical that they should not be "compensation" within the meaning of the apportionment clause. *Quaere*, if temporary total is "compensation" under the maximum recovery clause, by virtue of not having been specifically excluded therefrom, is it not "compensation" under the apportionment paragraph, and thereby apportionable? The court in this case, with four justices dissenting, has answered this question in the negative. As a policy decision their holding is easily justified. The goal of workmen's compensation is to provide cash benefits and medical care for the injured employee, placing the cost ultimately on the consumer.[20] The Mississippi court has frequently asserted that the objects of the act are basically humanitarian.[21] The person who receives the primary benefit from workmen's compensation is, after all, the workman.

Don Preston Lacy

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[14]Md. Ann. Code art. 101, § 36(7) (Supp. 1964).

[15]Harris v. Bechtel Corp., 74 Idaho 308, 261 P.2d 818 (1953).

[16]Idaho Code Ann. § 72-323 (Supp. 1963).

[17]See Lindskog v. Rosebud Mines, Inc., 84 Idaho 160, 369 P.2d 580, 584 (1962).

[18]Miss. Code Ann. § 6998-04 (Supp. 1962).

[19]Miss. Code Ann. § 6998-07(b) (Supp. 1962).

[20]1 Larson, Workmen's Compensation § 1.00 (1964).

[21]See Central Elec. Power Ass'n v. Hicks, 236 Miss. 378, 385, 110 So. 2d 351, 354 (1959).

RECENT BOOKS

THE CIVIL RIGHTS ACT OF 1964. Bureau of National Affairs, Inc., Washington, D.C., 1964. Pp. vii, 424. $9.50. STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION. Bureau of National Affairs, Inc., Washington, D.C. 1964. Pp. ii, 285. $6.50.

Civil rights legislation is not a new phenomenon; in the last decade the dictates of Federal (and State) law have increased, even to the point of becoming common-place. Today, the processes of law are playing a more important part than ever before in the area of civil rights—and when we look to this vast field of political and judicial activity and the array of legal arsenals involved in the current social battle, it is necessary to take stock of the role of law itself. Increasingly, we are reminded that this is a world of interdependence; it is obvious that these are times of crises and flux. As our society continues toward its chartered destiny, so too do the interests, demands, and expectations of the community reshape. As would be expected, this change is also mirrored in legal rules, as articulated by acts of Congress, decisions of the courts, and other lesser manifestations such as, administrative regulations and the orders of governmental agencies. Another realization must surely be that law is only a means to an end. It is far more than a lifeless body of rules: today legal prescriptions must be regarded as a conscious means of working toward specified and justifiable (and preferably consensual) social objectives. The resources of governments are today large, the opportunity for increased use of scientific knowledge ever expanding, and the search for factual data and the analysis of past trends continues unabated. Certainly, here somewhere, rules of law have their place. So, too, does the Civil Rights Act of 1964.

The Civil Rights Act of 1964 is, furthermore, no ordinary law. Eighty-three days of debate in the Senate would not have been devoted to a lesser bill. The net of its application is spread wide; the overall impact of the legislation will certainly be of great social implication. In addition to the diverse situations covered by the act, it is an understatement to say (as anyone who has perused the twenty-eight pages will testify) that the legislation is also complex—both in the prescription set down and in the mechanisms for application. A concentrated effort at a careful collection and analysis of the act and its legislative ancestry is therefore most welcome, especially when undertaken by a research institution of experience and resources. In *The Civil Rights Act of 1964* the editors have attempted to satisfy two demands—on the one hand, to present a legal-type, analytical summary of the provisions of three parts of the act, while on the other to collect, in edited form, the most relevant legislative background. The volume concentrates on the three major titles of the act: title II, (public accommodations); title VI (federal assistance); and title VII (fair employment practices). We are informed that "The present volume is devoted to a painstaking examination of these three aspects of the Statute."[1] Within the limitations imposed by

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[1]BNA, THE CIVIL RIGHTS ACT OF 1964 vii (1964) [hereinafter cited as CIVIL RIGHTS ACT].

the nature of the subject, and in the course of 424 pages, this objective is largely consumated.

The most thorough analysis contained in this volume is that of the fair employment practices law—title VII of the act. This analysis is comparable to other summaries now available.[2] What is lacked in sophistication is made up in the thoroughness of the dissection. There is also some repetitions, largely because of the inclusion of "The Law in Brief" as chapter I—which is then expanded later. No assessment of the merit or the workability of the extensive provisions is contained. We are informed, meekly, that "it truly is an important law"[3]—which means (although we are not told) that it will affect 26,000 employers with a pay roll of about thirty million persons.

A brief legislative history, dating back to the earliest proposals in Congress for such a federal law in 1943, and culminating in the acceptance of the compromise bill hammered out largely at the behest of Senator Dirksen, is offered in chapter 3. We are then exposed to a detailed analysis of the circumstances in which a federal right to equal opportunity in employment is established, and the way in which this right will be nurtured by the newly established Equal Employment Opportunity Commission. While the non-discriminatory requirements for employers and unions are not operative until July 2, 1965—and then only to employers of 100 or more workers (this number to decrease by twenty-five employees each year up to 1968)—the need for such explorative analysis is clear. The proscribed bases of discrimination—race, color, religion, sex, and national origin—are touched on.[4] The prohibition is broad, and "would appear to embrace virtually all aspects of the employer-employee relationship,"[5] including advertising for positions, hiring and firing, environmental conditions and facilities. The application of the provisions to employment agencies and labor unions is also outlined, as are the many exceptions to the prohibition. Finally section 703(j), designed to offset fears that the provisions would establish the need for a system of quotas to rectify existing imbalances in employment, is reiterated.[6]

Chapter 6 contains an examination of sections 705-13 of the act—dealing with the administration and enforcement of the preceeding prohibitions within the pseudo-administration Equal Employment Opportunity Commission (which has not yet been organized, despite the size of its statutory task), moving from initiation of proceedings[7] to the remedies available.[8]

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[2]Two of these, professionally produced for the shelf of the lawyer or businessman, are PRENTICE-HALL, HOW THE NEW CIVIL RIGHTS LAW AFFECTS YOUR EMPLOYMENT (1964), and NATIONAL ASS'N OF MANUFACTURERS, THE CIVIL RIGHTS ACT OF 1964 (1964).

[3]CIVIL RIGHTS ACT 1.

[4]*Id.* at 31.

[5]*Id.* at 33.

[6]*Id.* at 39.

[7]*Id.* at 42.

[8]*Id.* at 47.

Two other contributions are contained in part I. The first is the inclusion, albeit briefly noted, of a number of decisions of the National Labor Relations Board. The previous experience of the NLRB is rightly recognized by the editors as being of real relevance, both historically and jurisdictionally. The Board also began somewhat hesitantly. The second aspect to be appreciated is the emphasis, stemming from the Civil Rights Act, on the use (and exhaustion) of state procedures, if they exist, a requirement insisted upon by the Senate. Pursuant to this legislative regard for state's rights, chapter 7 explores the existing state law in the field. There are now 30 states with some form of fair employment laws (not including Mississippi), in diverse forms and operating with variable degrees of effectiveness. Complaints at the state level have, it seems, been surprisingly few; now, with a federal agency eying enforcement, the prediction is made that an increase in the use of state machinery can be expected.[9]

The federal government has had some previous experience in combatting discrimination. Under Presidential orders, prohibitions of discrimination have been included in governmental contracts, and in 1961 the President's Committee on Equal Employment Opportunity was established to further this governmental effort in its relations with contractors, with a potential jurisdiction over some 50,000 U.S. companies with 20 million employees. This experience, although recent and embryonic, is of course pertinant to implementation of the 1964 Act, and the editors of this volume have therefore included a summary in chapter 8.

In part two, the other foci of attention of this volume, public accommodations and federal assistance (titles II and VI respectively) are summarized. It is recorded[10] that this is not the first time the federal government has ventured into the field of establishing the right to use public accommodations: the Federal Civil Rights Act of 1875 contained a not dissimilar provision. Unlike its predecessor, the act has now, by a unanimous Supreme Court decision,[11] withstood constitutional challenge. The analysis of title II is very brief—only nine pages—and yet adequate, surveying the rights established and the remedies available. As in part one, no discussion of the merits or the difficulty of application of the provisions is undertaken, and some of the troublesome questions of legal interpretation in future application are barely hinted at.

Similarly, the exploration of title VI, which establishes a uniform policy of non-discrimination in federally assisted programs, is short and to the point—being restricted to the essence of the statutory provisions. In the space of eleven pages, a glimpse at the historical background prefaces an indication of the scope of the act and the method of administration and enforcement. Under section 602 of title VI, federal agencies are authorized and directed to issue regulations to carry out the government policy. Since publication of this volume regulations have materialized, and are fully indicative of considerable breadth in implementation.[12]

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[9] *Id.* at 69.

[10] *Id.* at 81.

[11] Heart of Atlanta Motel v. United States, 85 S.Ct. 348 (1964).

[12] See, *e.g.*, Regulations of the Department of Health, Education and Welfare, Federal Register Dec. 4, 1964.

All federal agencies dispensing funds are included, although to date most attention has been on money paid to the public school systems. Already the problem involved in the value judgments to be made by local authorities are with us; so, for instance, it is reported that only twenty-four of the State of Mississippi's local school districts have agreed to file compliance agreements.[13] This volume does not purport to assist in such decision-making; no attempt is made to isolate the real results of acceptance or non-acceptance of federal funds.

The subtitle of *The Civil Rights Act of 1964* is "Text Analysis and Legislative History." Part III begins with the text of the act. The remainder (and bulk) of the volume is then devoted to the latter aspect: legislative history. The following 152 pages contain the full text of the Report of the House Judiciary Committee, including the so-called compromise bill of the committee which was then adopted in the House. This bill, in turn, was replaced in the Senate. Despite this the Report of the House Committee remains significant. Many provisions survived to become law; alternatively, particular difficulties in the legislation were discussed by the House committee, to be later ironed out in the Senate. Additionally, there was no committee report on the Senate bill, which was worked out in informal bipartisan conferences and did not go through the usual committee procedure. The House committee report contains a majority and minority report, plus a number of individual reports expressing additional views. A good deal of the material is repetitious, yet it does include a host of information on the bill and its implications from many perspectives. The national feeling which led to enactment, and the purpose of the legislation, is spelled out: "Almost a century has elapsed since [the fourteenth amendment], yet not since Reconstruction has Congress enacted legislation fully implementing the article. A key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and of the several states."[14] The dialogue and disagreement of the members of the Committee is to some extent apparent, ranging from differences as to the desirability of the legislation, to its breadth, its constitutionality, the prospect of "government by injunction" and even as to the procedures used in the committee. These pages, in other words, depict both idealism and bitterness.

The House bill was modified substantially in the Senate, especially in regard to the enforcement provisions. With no committee report, nor a Senate-House Conference report as an aid, to glean the legislative intent we must turn elsewhere. Included in this volume, therefore, are statements offered in the course of the Senate debate, together with the Congressional Record citation. Senator Dirksen's explanation of the changes is recorded in full,[15] as is a readable side-by-side comparison of the textual provisions.[16] Various statements by Senator Humphrey are extracted, covering title II, title VI and title VII. Further elaboration is

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[13]Statement by J. M. Tubb, Superintendent of Education, The Commercial Appeal, March 24, 1965, p. 17, col. 7. (Mississippi ed.).

[14]Civil Rights Act 256.

[15]*Id.* at 289-96.

[16]*Id.* at 306-17.

gained from explanations made upon the return of the Senate bill to the House, and other Senate statements.

Five other documents, each read into the Congressional Record, have been selected by the editors. A letter from twenty-two prominent lawyers,[17] attesting to the constitutionality of the bill, is of historical interest. The interpretations by the Justice Department of certain parts of title VI[18] and title VII,[19] and a brief note from the Department of Labor advising against including sex as a base of prohibited discrimination,[20] are recorded (if unheeded). Finally in response to a request to the Justice Department, there is a listing—of considerable length—of the diversity of programs which may involve federal assistance within title VI.[21]

The concluding 46 pages collate material in relation to the attempt by the Federal government to cast out discrimination by governmental contractors. The relevant Presidential orders are recorded in full, together with the rules and regulations of the President's Committee on Equal Employment Opportunity. Compliance reports—similar to those which are being introduced under title VI of the act—are also reproduced.

State Fair Employment Laws and Their Administration is designed as a companion volume to *The Civil Rights Acts of 1964*. As mentioned above, the 1964 Act takes special cognizance of state legislation in the field of fair employment practices. Further, the new federal law is intended to encourage more states to adopt such laws and to stimulate more use of existing statutes. The compilation of all such state laws in a single volume must, therefore, be applauded. In alphabetical order, here we can find the unexpurgated and latest laws from thirty states. Not all of these will prevent the immediate application of the 1964 Act—because of their restricted scope. It is reported that the Department of Labor believes 22 of the state laws are compatible with the Civil Rights Act of 1964.[22]

As might be expected, the state laws differ from each other in a variety of ways. Not all of them are mandatory; the coverage is diverse—both as to the type of employment and the practices prohibited; and their administration takes different routes. A precise and yet useful summary of these distinctions prefaces the enumeration of the laws, and they are also graphically represented.[23]

It is unfortunate that the state laws are not annotated in any way, for it is only by deeper research into the frequency and type of decision reached at the state level that an indication of the real efficacy, effectiveness, and impact of such state laws can be gained. Similarly, no statement of the type of problems presented in each state is attempted.

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[17]*Id.* at 323-25.

[18]*Id.* at 359.

[19]*Id.* at 326.

[20]*Id.* at 336.

[21]*Id.* at 353-59.

[22]BNA, STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION ii (1964).

[23]*Id.* at 6-7.

This, together with employment figures generally, would certainly add to understanding. A compromise of sorts is reached: at the conclusion of the laws of each state, a few common job inquiries are listed as legal or illegal within the jurisdiction. In this way we are exposed to some of the subtle distinctions which must be made in the administration of a fair employment law. For example, in New York we are informed that it is lawful to inquire of the color of applicant's eyes and hair; it is unlawful to ask of the complexion of color of skin.[24] In California it is lawful to inquire whether an applicant is a citizen of the United States; it is unlawful to inquire "of what country are you a citizen?"[25]

This volume is, nonetheless, an important contribution to the large task of compilation of the existing prescriptions in this increasingly voluminous field. For the states without any fair employment practices laws, this work has twofold significance. The prohibitions of federal law, it must be remembered, reflect some of these state provisions very closely. Past decisions at the state level will almost certainly be utilized in understanding, interpreting, and applying the federal act. The second implication is more profound and of greater immediacy. While regard is had within the framework of the federal legislation to the use of the available resources at the state level—both in manpower and legal prescriptions—it follows (and title VII impliedly dictates) that if the states which presently offer no relief to a complainant wish to avoid effective pre-emption of the field and its enforcement by the federal agency and federal courts, the only alternative will be to emulate appropriate legislation of the other states or of Congress. In this way the ends of the federal law will be approached in accordance with the rising national consensus, while control of administration (at least initially) would rest with state officers. Serious consideration must surely be given to the adoption of compatible state laws, lest the vacuum remain. *State Fair Employment Laws and Their Administration* provides a convenient starting point for such a search.

The Civil Rights Act of 1964 and *State Fair Employment Laws and Their Administration* are designed for use as operation manuals, and probably one should not expect to find any assessment of the why's and wherefore's of the political current—and even skullduggery—such as has been creditably performed on the 1960 Civil Rights Act.[26] One can, in contrast, expect a more comprehensive index. For instance, in *The Civil Rights Act of 1964* there is no effort to refer to statements reflecting on the constitutionality of the act; nor is there any heading on the topical matter of "voting." Some might complain, also, because the statements from Congress—even the conversion into print of the sonorous voice of Senator Dirksen—are found in extremely small type. These detracting comments, and others that could be mounted, fade into pettiness in light of the considerable contribution of these two volumes. The chief asset of *The Civil Rights Act of 1964* will probably prove to be the sensible inclusion of the background legislative material. Not everyone will wish to struggle through it, yet for the selective reader, historian,

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[24] *Id.* at 192.

[25] *Id.* at 27.

[26] BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960 (1962).

or political scientist, here is a splendid method of efficiently delving into the genealogy of the act—much more efficient than pouring over the legislative vastness of the Congressional Record. For the busy lawyer advising a client, and coincidentally predicting the future implementation of governmental policy and judicial decision, these volumes will aid comprehension in new and expanding problem areas. Even more so for the practioner engaged in this type of litigation—and there will be more of them!

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MANAGING THE LAW OFFICE. Edited by Daniel J. Cantor. Chicago: Callaghan & Co., 1964. Pp. 296. $18.50.

The creative practice of law is a sensitive and resourceful blend which combines prudence with reliance upon tested, established rules and modern, adequately equipped offices. Certainly law offices today are much better equipped than a decade ago, but in many modern offices the procedures and methods are still awkward, outdated, and costly. If you are plagued by irksome, routine, and distasteful tasks, this volume will demonstrate how any attorney can be saved unnecessary distractions and burdens. A lawyer's time and talents should be channeled into creative, lucrative work, serving his clients more promptly, more economically, more efficiently, and thereby creating greater profits. Perhaps this book will not be a panacea for all problems, but the authors give you much tested information for systematically evaluating every phase of your law office operation. More important, you may secure many suggestions on how to strengthen your weak areas.

Some of the most distinguished names in the legal profession have been called upon to compile outstanding chapters containing tested and authoritative information. Certainly each of the nineteen authors is an expert in the particular field about which he is writing, and is experienced and qualified to produce his contribution. The elegance of these writings is an inseparable, integral part of the whole.

After reading the chapter, "The Function and Scope of Law Office Management," the reader may select, from the subsequent chapters, applications which will be suitable to his needs. These essays discuss the pros and cons of various well-known law office systems. Usual bottlenecks are analyzed, and tested procedures for eliminating them are suggested. How to regard overhead costs, how to develop management and organization in your office, time-keeping, bookkeeping, compensation, cost accounting, and organization are thoroughly discussed. The chapter, "The Art of Billing Client," is outstanding. Among the specific subjects treated in this chapter are: income expectation, annual hours, methods of calculating hourly rates, contingent fees, retainers, billing, and collection of fees.

After a careful reading of this volume, our conclusion is reached that the avowed aims stated in the foreword have been admirably achieved:

> In the main, this book will provide the reader with a basic body of knowledge and a well-rounded background from which he may then keep abreast of the fast-changing technology and thinking in law office management. The reader will find materials on basic "Manual Methods" and simple concepts as well as the sophisticated techniques of automated data processing, statistical profit distribution and microfilm applications for the law offiice. The approaches and methods provided by this book are presented as complete concepts and applications. The authors have directed their writing to an expected readership from varying sizes of law offices and different types of practice. All of the methods reported upon have proved workable, acceptable and maintainable.[1]

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[1]CANTOR, MANAGING THE LAW OFFICE iii (1964).

THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT. Daniel J. Baum. Syracuse: The Syracuse University Press, 1964. Pp. xviii, 153. $5.75.

The American businessman has long since reconciled himself to the necessity of avoiding the navigational hazards of the Federal Antitrust Statutes. Aware that direct confrontation will not dislodge them, he has resorted to more sophisticated tactics—either by skillfully circumventing them or by including compliance with them as a factor in calculating the costs of an enterprise. The businessman of today has learned to live with, if not to love, the antitrust laws.

His task, however, has not been made easier for him by the proliferation of statutes, vaguely worded and loosely drawn, with more than a suspicion of confusion in policy objectives. As Professor Baum observes: "Whether the antitrust laws are in harmony with the Robinson-Patman Act poses no mere academic problem."[1]

Further difficulties are created for the navigator of a business by the necessity of steering a course between the Scylla of the Federal Trade Commission and the Charybdis of the Justice Department. Of course, this task is not simplified by the rivalry between these two pillars of government. Professor Baum quotes a Justice Department official as saying: "We [at the Department of Justice] tried to take all that was good and give the Commission all that we didn't want."[2] Professor Baum concludes: "Logic may be desirable, and resolving issues on the merits may be the goal; but the human element cannot be judged."[3]

It is unfortunate that Professor Baum did not elaborate on this observation. Throughout the book there appear allusions to the difficulties confronting the businessman seeking to comply. Statements such as the following are of immediate practical significance to the businessman and his lawyer in their efforts to avoid collisions with the Federal Government:

> To further a national antitrust policy the Federal Trade Commission, either formally or informally, may refuse to acquiesce in a ruling of a Court of Appeals. An otherwise forceful decision may find obscurity through administrative edict.[4]

Professor Baum has elsewhere recognized the significance of publicity in the operations of the FTC.[5] Publicity is valuable as an instrument of deterrence; no businessman wants to acquire a bad "image." Implementation of FTC policy decisions rests on the willingness of business to voluntarily comply. Publicizing the decisions of the FTC and the antitrust division enables the conscientious businessman to chart

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[1]BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT 4 (1964).

[2]*Id.* at 112.

[3]*Ibid.*

[4]*Id.* at xviii.

[5]See Baum & Baker, *Enforcement, Voluntary Compliance, and the Federal Trade Commission*, 38 IND L.J. 323 (1964).

a course consistent with the requirement of these bodies. It is regrettable that Professor Baum did not seize the opportunity to explore the intricacies of the day-to-day administration of the law by these bodies. Hints such as those mentioned earlier serve to remind us that law in action frequently bears little resemblance to the "basic myth."[6]

A compilation of citations is no longer sufficient guidance into the operations of agencies such as the FTC. What would be of greater benefit to the practicing bar would be an exposition of the operations of the FTC derived from empirical observation. Without any warning signs, "an otherwise forceful decision"[7] may yet turn out to be a Siren's song, luring unwary businessmen onto the rocks of an obscure administrative ruling. Businessmen and their legal advisers have need of a chart to guide them through the navigational hazards of the antitrust laws. Far too often they end up with a tourist folder.

Professor Baum has provided a useful commentary to the Robinson-Patman Act, one which the practitioner will find provides ready access to pertinent authorities, together with a crisp commentary. Nevertheless, one hopes that the next edition will be richer in the insights so tantalizingly offered in this one.

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[6]FRANK, LAW AND THE MODERN MIND 183 (1963).

[7]BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT xviii (1964).

TAX SAVINGS THROUGH ESTATE PLANNING. William J. Bowe. Nashville, Tennessee: Vanderbilt University Press, 1963. Pp. 102. $3.50.

Professor William J. Bowe is a member of the law faculty of the University of Colorado and nationally known as an expert in estate planning. His current treatise, which he wrote for use by lawyers, is a well written and comprehensive work which was enthusiastically received by the bar, and occupies the shelves of law libraries from coast to coast. From the standpoint of the attorney-estate planner this little volume provides no new information and, in fact, was not written for his use. It is a small book on estate planning which is designed for lay readers and their nonlegal advisers, trust officers and accountants, investment specialists, and life underwriters. While the book was written for nonlawyers, it is an extremely useful vehicle in giving the older lawyer who has little estate planning knowledge, and the younger lawyer who somehow graduated from law school without having had a course in estate planning, an excellent introduction to the field. Attorneys who fall in those categories most certainly will benefit by the book. While the layman has little or no professional knowledge of taxation, wills, trusts, property, insurance, conflicts of law, partnerships, corporations, oil and gas, and other fields of law, the lawyer who reads this book does, and, I believe will profit from its reading.

Clearly, Mr. Bowe accomplishes what he sets out to do—provide the layman with a general knowledge of estate planning. He duly warns the reader that costly mistakes will result when untrained and inexperienced persons undertake to advise in the planning of estates. The lay reader is advised that no planning should ever be undertaken without the aid of a competent adviser. Mr. Bowe indicates that he will have accomplished his purpose if he arouses the interest of estate owners and stimulates their thinking sufficiently to get them into the offices of their lawyers for a review of family objectives, and the preparation and execution of many long-overdue will revisions.

The book begins with a discussion of the importance of taxes and introduces the reader to several plans, explaining the significance of each. Gift taxes, income taxes, charitable gifts, and basic principles concerning lifetime gifts, successive life estates, trusts, the use of gift tax privileges, and the estate tax marital deduction are used to lay a predicate for further treatment. The utilization of the trust device to save estate taxes is the subject of a separate chapter. Additionally, gifts in contemplation of death, sales within the family, joint tenancies, life insurance, family business, and charitable gifts and bequests are all included within numerous illustrations and the significance of each.

The book is interesting and readable and should have a definite appeal to the intelligent lay reader who is concerned with the disposition of his estate. He will become acutely aware of the complexities involved in estate planning and the urgent necessity to plan his own estate with the assistance of his attorney. Lawyers who are not familiar with estate planning will find it of assistance in relating the many fields of law involved in estate planning and will have a deeper appreciation for the problems of their clients. There are several appendices which include federal estate tax rates, federal credit for state taxes

paid, federal gift tax rates, and revocable trusts in estate planning; there is also an excellent word index. I would suggest that members of the bar recommend this little volume to accountants, trust officers, life underwriters, and investment men with whom they do business. The book should be in the reception room of the law office available for the waiting client to peruse.

CORPORATE TAX MANAGEMENT. Arnold Williams. Chicago: Commerce Clearing House, Inc., 1964. Pp. 352. $15.00.

This volume was written for the corporate tax executive. The advent and growth of burdensome taxation has been paralleled by the appearance of specializing professionals in the form of the tax attorney and the tax accountant. The complexities of the Internal Revenue Code and the regulations dealing with income, estate, and gift taxation require the knowledge and skill of the experienced expert if he is to guide his client in the path of planned tax saving. Today a large number of businesses employ a tax executive who has assumed the function of a "specialized expert"—a person who is knowledgeable about the application of the tax laws in a given business area or field—actually the business in which his employer is engaged. His function in this day and age is indeed important; the tax executive is concerned with current compliance as well as the important task of tax planning. Additionally, the tax executive is skilled in business management.

When one considers the Internal Revenue Code, with its maze of regulations, revenue rulings, revenue procedures, and proceedings in the tax court, United States District Courts, and Courts of Appeal, together with the pronouncements of the United States Supreme Court, the enormity of the task of the tax executive staggers one's imagination. Tax planning is of the essence if one expects to reap the tax harvest. The tax executive must keep his ear closely tuned to the current tax inquiries and proposals in Congress; he is concerned with possible changes in the law and regulations which will have an effect upon his specialized expertise, and thus affect the tax position of his employer. He must also be quick on his tax feet since his employer, no doubt, is part of a larger group making demands and anticipating favorable or unfavorable legislation or rulings which will affect an entire industry. Frequently he will be called upon to exercise his ability as a clairvoyant (probably a daily occurrence) with respect to the giving of tax advice at all levels, and to suggest procedures which will accomplish the desired result and not run afoul of the tax laws. The tax executive's training should also prepare him for dealings with the Internal Revenue Service in matters of negotiation and appellate procedures. As in many other professions, one's close association with a particular business enterprise over a long period of time will occasionally produce a myopic view of a specific problem, and the tax executive will not be able to see the forest for the trees; therefore, he must always be on the alert as to when to solicit the assistance of outside professional tax experts.

Today the corporate tax expert can rely on many specialized tax publications to assist him in the tax-decision-making process. Commerce Clearing House, the publisher of this volume, is considered by many to

be the leader in the field of tax publications. This book represents a useful addition to the ever growing list of CCH publications.

The tax law changes frequently, and at times the code and regulations are obtuse and indefinite. Personal judgment plays a very important role in the solution of many tax problems, particularly in the lofty realms of sophisticated corporate taxation. While there has been some technical advice and literature available in the field of corporate tax management, relatively little of it has been in such usable form as that presented in Arnold Williams' book. It represents an authoritative guide for the executive engaged in corporate tax management. Mr. Williams has brought to bear first hand experience gained in corporate tax management and has compiled a great number of forms which cover both the unusual and the routine tax situations. They cover most of the situations met by the corporate tax department, including data collection, worksheets, calendar control lists and cards, payment records, check requests, and audit reports.

The book analyzes and describes corporate tax management in terms of systems and procedures—how to do it! Simultaneous procedures of return preparation, filing, and audit are treated functionally. The book contains five valuable appendices: Tax Planning Checklists, a Technical Test, Internal Audit Checklist, and finally an elaborate forms appendix. The book is organized efficiently with first things first. Since this work is designed for the professional corporate tax executive, a chapter is concerned with tax planning. The other chapters proceed in orderly fashion to cover: organizing for tax management, assembling essential data, preparing federal income tax returns, preparing other tax returns, payments, claims, handling government audits, improving communication and coordinating, working with outside counsel and professional organizations, selecting, training and retaining a tax man and tax management function, and facilities.

The book is highly readable to the professional and carefully presents the problems of corporate tax management in understandable terms. Tax attorneys should have a copy and all of those engaged in corporate tax management will find that the modest investment of the price of this volume will more than repay the user. It is a highly useful volume which will assist the corporate tax executive and his attorney.

Arthur B. Custy
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BOOKS RECEIVED

THE EXTENSION OF LEGAL SERVICES TO THE POOR. Edited by Jeanette Stats, U. S. Department of Health, Education and Welfare. Washington, D.C.: U. S. Government Printing Office, 1964. Pp. xi, 190. $.60.

FOUNDATIONS—20 VIEWPOINTS. Edited by F. Emerson Andrews. New York: Russell Sage Foundation, 1965. Pp. 99. $1.25.

THE SOUTH AND SEGREGATION. Peter A. Carmichael. Washington, D.C.: Public Affairs Press, 1965. Pp. 337. $6.00.

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